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The migration crisis and the fundamental role of NGOs during search and rescue operations in the Mediterranean

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TABLE OF CONTENTS

ABSTRACT	1
INTRODUCTION	9
CHAPTER I – THE MIGRATION CRISIS IN THE MEDITERRANEAN AREA.	
1. The current migration crisis and its evolution over the years.	11
1.1 Recent data on migration in the Mediterranean area.	13
2. International legal framework governing migration at sea.	16
2.1 The International Convention for the Safety of Life at Sea (SOLAS).	17
2.2 The Convention Relating to the Status of Refugees.	18
2.2.1 The principle of non-refoulement.	20
2.2.2 The principle of non-refoulement as international customary law.	22
2.3 The International Convention on Maritime Search and Rescue (SAR).	24
2.3.1 The Search and Rescue Regions.	25
2.3.2 The division of the areas of responsibility among the Mediterranean states.	26
2.3.3 The experts' opinions about search and rescue activities in the Mediterranean.	28
2.4 The United Nations Convention on the Law of the Sea (UNCLOS).	29
3. European legal framework governing migration.	31
3.1 The Treaty of Amsterdam.	32
3.2 The Treaty of Lisbon.	35
3.3 The Dublin Convention.	37
3.3.1 The Dublin II Regulation.	39
3.3.2 The Dublin III Regulation.	41
3.3.3 The Dublin IV Proposal.	42
3.4 The externalization of migration policies in bilateral agreements.	44
3.4.1 The EU - Turkey Statement.	45
3.4.2 The Memorandum of Understanding between Italy and Libya.	46

CHAPTER II – THE SEARCH AND RESCUE OPERATIONS IN THE
MEDITERRANEAN AND THE INTERVENTION OF NGOS.

1. The search and rescue operations and the issue of the smuggling of migrants in the Mediterranean.	49
2. The main European Agencies involved in the fight against the smuggling of migrants.	50
2.1 Europol.	51
2.2 EUNavFor Med.	52
2.3 Frontex.	53
2.4 Frontex’ Operations.	54
3. The intervention of NGOs: definition, characteristics and international legal status.	55
3.1 Different types of NGOs.	58
4. The main NGOs which have operated in the Mediterranean from 2014 to 2018.	59
4.1 Migrants Offshore Aid Station (MOAS).	59
4.2 SOS Méditerranée.	60
4.3 Médecins Sans Frontières.	60
4.4 Sea Watch.	62
4.5 Sea Eye.	62
4.6 Jugend Rettet.	63
4.7 ProActiva Open Arms.	63
5. The accusations brought against the NGOs.	64
5.1 The defence of the NGOs against the accusations.	66
6. The crisis of regulatory model after the increasing intervention of new subjects at sea.	69
6.1 The Voluntary Code of Conduct for Search and Rescue Operations undertaken by civil society Non-Governmental Organizations in the Mediterranean Sea.	70
6.2 The Italian Code of Conduct for NGOs involved in Migrant Rescue Operations at Sea.	72
7. The human rights violations in Libya and the need for NGO intervention.	78

CHAPTER III – THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS IN THE MEDITERRANEAN AREA AND ANALYSES OF SPECIFIC CASES.

1. The international and regional legal framework for the protection of migrants’ rights.	83
1.1 The Universal Declaration of Human Rights.	84
1.2 The International Covenant on Economic, Social and Cultural Rights and the International Covenant for Civil and Political Rights.	85
1.3 The Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment.	86
1.4 The European Convention on Human Rights.	87
1.5 The Charter of Fundamental Rights of the European Union.	88
2. The principle of non-refoulement in the jurisprudence of regional and international Courts on human rights.	89
2.1 The case <i>Hirsi Jamaa and Others v. Italy</i> .	95
3. Violations of migrants’ human rights in the external policies of the European Union.	97
3.1 Bilateral agreements: The EU-Turkey Statement and the Memorandum of Understanding between Italy and Libya.	98
3.2 Different approaches of jurisprudence concerning migrants: The case <i>X. and X. v. Belgium</i> and the case <i>Al Chodor and Others</i> .	103
4. NGOs and migrants’ human rights: The International Federation for Human Rights (FIDH).	110
5. Specific cases involving NGOs in 2018: The case of ProActiva Open Arms.	112
5.1 The cases of SOS Méditerranée and its Aquarius vessel.	115

CHAPTER IV – CURRENT APPROACH TO THE ISSUE OF MIGRATION AND FUTURE DEVELOPMENTS.

1. The retreat of NGOs from the Mediterranean area after August 2018.	119
1.1 The intervention of the Mediterranean Organization.	122
2. A humanitarian not a migration crisis.	124

2.1 Possible changes to improve the management of migration flows in the Mediterranean area.	126
3. Migration issue internationally: The NGO Committee on Migration.	128
3.1 Possible impact of the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact on Refugees.	130
4. Forecasts on possible future of humanitarian NGOs.	134
BIBLIOGRAPHY	139

ABSTRACT

La presente tesi di laurea magistrale si propone di analizzare la questione della crisi migratoria che i paesi dell'area Mediterranea si sono trovati a fronteggiare a partire dall'anno 2014 fino al giorno d'oggi, ed osserva, in particolar modo, il ruolo svolto dalle Organizzazioni Non Governative (ONG) negli interventi di ricerca e soccorso in mare.

Tale argomento risulta di estrema attualità e rilevanza, considerando i sempre numerosi casi di migranti che attraversano il Mediterraneo per raggiungere le coste europee e le molteplici controversie che, puntualmente, accompagnano i complessi compiti di salvataggio ed accoglienza. Le crescenti problematiche legate a questi, sono enfatizzate da forti tensioni ed aspri dibattiti che mettono in discussione sia le relazioni fra gli Stati membri dell'Unione Europea, sia i ruoli di tutti gli attori coinvolti. A tal proposito, le ONG intervenute per sopperire alle carenze da parte degli Stati Mediterranei nelle missioni di ricerca e soccorso dei migranti, sono state e sono tuttora viva fonte di discussione, oggetto di serie critiche, come di ampi consensi. Gli eventi che vedono coinvolte le ONG nel Mediterraneo avvengono a ritmo quotidiano e rappresentano pertanto argomento in perenne sviluppo ed aggiornamento. La presente tesi si limiterà ad osservare i casi avvenuti entro l'inizio di Gennaio 2019.

Questo testo affronta il suddetto argomento suddividendolo in quattro capitoli, i quali iniziano introducendo il tema dei flussi migratori in Europa, spiegando come essi vengano gestiti dai paesi coinvolti, per trattare, poi, il tema principale delle ONG e dei loro interventi di salvataggio. La dissertazione continua con una riflessione sulla rilevanza del rispetto dei diritti umani dei migranti e del ruolo delle ONG in quanto garanti di tale rispetto, concludendo infine con alcune possibili previsioni sul futuro di queste organizzazioni e su un auspicabile miglioramento nella gestione dei flussi migratori in questa parte del mondo, così come a livello globale.

In particolare, il primo capitolo esordisce descrivendo le migrazioni che hanno caratterizzato la storia dei paesi dell'area Europea a partire dagli anni '50 fino ad oggi. Viene dunque discussa l'attuale crisi migratoria tramite i dati forniti dall'Organizzazione Internazionale per le Migrazioni e L'Alto Commissariato delle Nazioni Unite per i Rifugiati. Successivamente, viene esposto il regime giuridico che governa la gestione dei flussi migratori a livello internazionale e vengono descritti i principali trattati che forniscono le norme ed i principi a cui tutti gli Stati membri devono attenersi. Il capitolo

prosegue, poi, analizzando il regime giuridico specifico dell'area di interesse, quindi dell'Europa, elencandone le relative Convenzioni e leggi in ambito di asilo ed immigrazione. Infine, si conclude osservando come gli Stati Europei, al fine di trovare soluzioni alla complessa gestione dei flussi migratori, abbiano fatto ricorso all'adozione di trattati bilaterali con paesi terzi, i quali trattati hanno avuto l'esito di esternalizzare le politiche migratorie. Ciò si riferisce al tentativo, tramite tali strumenti, di allontanare dall'Europa la responsabilità di gestire e controllare i migranti, trasferendo l'onere su altri Stati. Chiari esempi di tale pratica sono l'Accordo fra Unione Europea e Turchia ed il Memorandum d'Intesa fra Italia e Libia, i quali vengono analizzati al termine di questa prima parte.

Il secondo capitolo introduce il tema delle operazioni di ricerca e soccorso e la problematica, ad esse legata, del contrabbando dei migranti. Quest'ultima rappresenta una delle questioni più complesse legate alle migrazioni via mare, che gli Stati europei si impegnano fermamente a contrastare. A tal fine, l'Unione Europea conta sul supporto di numerose Agenzie, le quali intraprendono attività sia di salvataggio che di lotta al contrabbando. Con le stesse priorità, anche le ONG svolgono un ruolo cruciale e di fondamentale importanza per raggiungere l'obiettivo di salvare dal mare quante più vite possibile. Tuttavia, si nota come esse siano bersaglio di numerose accuse che ne mettono in discussione la trasparenza e la bontà delle operazioni. Ad esempio, le ONG vengono incolpate di essere esse stesse fattore di incoraggiamento (*pull factor*) delle partenze, le quali, secondo le accuse, aumenterebbero proprio a causa della loro presenza in mare. In seguito, la tesi evidenzia, in dettaglio, le difese che si possono adottare al fine di confutare ognuna di queste insinuazioni.

Il secondo capitolo continua, poi, concentrandosi sul ruolo delle ONG a livello giuridico e si focalizza sulle recenti fonti normative, elaborate appositamente per regolare la loro condotta. Infatti, essendo un soggetto relativamente recente nell'ambito delle relazioni internazionali, esso soffre della mancanza di un regime giuridico adatto. Per sopperire a tale carenza, sono stati stilati due Codici di Condotta, uno volontario rivolto alle ONG che intraprendono operazioni di ricerca e soccorso nel Mediterraneo, ed un secondo, elaborato dal governo italiano, il quale ha posto alcuni limiti alle ONG ad esso non aderenti. Entrambi forniscono regole e standard da seguire, elaborati anche al fine di allontanare le motivazioni alla base delle accuse a loro rivolte. Il Codice italiano, tuttavia,

non è privo di critiche. Prima di tutto, può essere classificato come ulteriore esempio di eternalizzazione delle frontiere. Esso, infatti, mira alla riduzione dei flussi migratori attraverso misure prese al di fuori dei confini europei. Numerose disapprovazioni sono rivolte verso quest'ultimo Codice soprattutto perché richiede alle ONG di non intervenire qualora le operazioni necessarie si dovessero svolgere nelle acque territoriali della Libia, lasciando alle sue autorità competenti la responsabilità di effettuarle. Il rapporto tra le ONG e la Libia è piuttosto controverso e la sua descrizione si pone al termine di questa seconda parte della tesi. La questione principale si concentra sul fatto assodato che la Libia dimostri di compiere azioni irrispettose dei diritti umani dei migranti, in violazione del diritto internazionale umanitario. Al fine di proteggere tali diritti, le ONG spesso decidono, comunque, di intervenire con azioni di ricerca e salvataggio nelle acque che sarebbero sotto la responsabilità della Guardia Costiera libica. Questa condotta è ulteriore fonte di critiche ed aspri dibattiti nei quali vengono anteposte diverse priorità.

Il terzo capitolo si concentra, in particolare, sul tema dei diritti umani dei migranti. Esso inizia analizzando il regime giuridico umanitario sia internazionale che dell'Unione Europea, prendendo in esame le principali Convenzioni e Dichiarazioni esistenti al riguardo. Successivamente, vengono evidenziati casi in cui tali diritti abbiano subito delle violazioni. A tal proposito, vengono presi nuovamente in considerazione i due accordi bilaterali menzionati nel capitolo I, il primo adottato tra Unione Europea e Turchia, il secondo tra Italia e Libia. Come si osserva, suddetti documenti, nel cercare di gestire i flussi migratori, non rispettano vari diritti fondamentali, risultando quindi fortemente criticabili dal punto di vista umanitario.

In seguito, la dissertazione si focalizza sul rispetto dei diritti umani che l'Europa tende a garantire più all'interno che all'esterno dei suoi confini, ed a dimostrazione di questa tesi vengono prese in esame due rilevanti sentenze, rispettivamente relative al caso *X e X c. Belgio* ed al caso *Al Chodor*. Successivamente, il capitolo collega il tema delle ONG a quello dei diritti umani descrivendo le funzioni facenti capo alla Federazione Internazionale per i Diritti Umani, un'Organizzazione Non Governativa che si impegna nella difesa dei diritti civili, economici, sociali e politici a livello globale e presta un'attenzione particolare alle problematiche concernenti i diritti di migranti e richiedenti asilo nell'area Mediterranea.

Infine, vengono descritti alcuni noti casi che hanno coinvolto le ONG ProActiva Open Arms e SOS Méditerranée nel 2018, i quali possono servire da esempio per mostrare le notevoli difficoltà che si manifestano in relazione alle operazioni di soccorso nell'area Mediterranea. Le imbarcazioni infatti, dopo aver effettuato operazioni di ricerca ed aver soccorso numerosi migranti, sono state costrette a rimanere in mare per diversi giorni prima di riuscire ad attraccare. Nessuno Stato costiero accordava l'apertura dei propri porti. La situazione di stallo creatasi in entrambi i casi si pone in evidente contrasto con il diritto internazionale del mare analizzato nel primo capitolo, risultando nel medesimo tempo inosservante del diritto umanitario spiegato in questa sezione. Tuttavia, seppure le vicende menzionate abbiano, entro alcuni giorni, raggiunto una soluzione, la problematica della chiusura dei porti e dell'accoglienza negata non solo tende a ripresentarsi ogni qualvolta si renda necessaria un'operazione di ricerca e soccorso, ma tende addirittura ad aggravarsi. Gli Stati costieri europei, infatti, si dimostrano sempre più inclini a mantenere posizioni ferme e quanto più irremovibili per quanto riguarda la volontà di impedire gli sbarchi nei propri territori nazionali.

Legandosi a questa seria questione, il quarto ed ultimo capitolo inizia prendendo in esame gli avvenimenti svoltisi verso la fine di Agosto 2018, quando tutte le ONG presenti nel Mediterraneo hanno deciso, progressivamente, di ritirarsi ed abbandonare la zona di azione. Tale scelta è stata presa principalmente di fronte alle innumerevoli difficoltà derivanti dalla chiusura dei porti, ma altresì per le pesanti accuse a loro rivolte, le quali si stavano sempre più diffondendo. Questo ritiro ha causato un'assenza nelle missioni di salvataggio dei migranti, i quali non hanno cessato di partire verso le coste europee. Di fronte al bisogno di intervento dovuto ai ricorrenti casi di tragedie in mare, a Novembre 2018 le ONG ProActiva Open Arms e Sea Watch hanno pertanto deciso di tornare ad operare, questa volta contando sul supporto di un'altra organizzazione, l'italiana Mediterranea. La tesi, quindi, si concentra sull'analisi dei recenti eventi in cui le tre organizzazioni hanno unito le forze per intraprendere, insieme, missioni di soccorso. Fra Dicembre 2018 ed inizio Gennaio 2019, esse hanno recuperato e condotto in salvo un gran numero di migranti, seppur con notevoli difficoltà, lunghe trattative ed estenuanti attese in mare.

Il capitolo continua riflettendo su come questa sia da definirsi crisi "umanitaria" più che "migratoria", per diversi motivi. Prima di tutto il termine "migratoria" aiuta a fomentare

l'ormai diffusa idea che la crisi sia colpa dei migranti stessi (idea che facilita la diffusione di atteggiamenti intolleranti), concentrando l'attenzione dell'opinione pubblica sulle partenze e non sulle cause che le provocano. Infatti, le motivazioni che spingono le popolazioni a lasciare il proprio paese di origine sono la vera causa della crisi, e tali motivazioni si identificano in guerre civili, disastri dovuti al cambiamento climatico, povertà e violenza, perciò elementi che contribuiscono a creare una crisi umanitaria. Inoltre, è possibile affermare che la definizione "crisi migratoria" generi la percezione di un sistema migratorio europeo fallimentare sotto ogni aspetto. Eppure, vasta parte dei movimenti che si svolge nell'area europea procede regolarmente, tuttavia solo per quella popolazione che riesce ad ottenere visti e quindi una mobilità sicura e legale. Alla luce di questa osservazione, risulta che la problematica del sistema migratorio si limita esclusivamente a chi fugge per motivi umanitari, dal momento che in questi casi una via sicura e legale non viene garantita dall'Europa. Pertanto, questa crisi potrebbe essere meglio definita umanitaria o "di accoglienza", caratterizzata dal fallimento di un'equa suddivisione di responsabilità fra gli Stati europei nell'affrontarla. Dunque, essa potrebbe essere chiamata anche "crisi di umanità", dal momento che il sentimento della solidarietà fra gli Stati e nell'opinione pubblica diviene sempre più debole. Si diffondono infatti idee nazionaliste, tendenti a suscitare atteggiamenti razzisti ed intolleranti, che non si pongono il salvataggio delle vite umane come priorità. La mancanza di unione e cooperazione fra i vari Stati europei sulla questione si manifesta in maniera sempre più evidente e questo aggrava una situazione per la quale, in assenza di un'adeguata politica comune europea, non si intravede una chiara soluzione.

In seguito, la tesi espone i progetti futuri che la Commissione Europea ha proposto al fine di apportare miglioramenti nella gestione dei flussi migratori. Fra questi, la Commissione invita al rafforzamento delle capacità operative dell'Agenzia Europea per l'Asilo, che lavorerà in cooperazione con la Guardia Costiera, fornendo assistenza tecnica durante le analisi delle richieste d'asilo. Inoltre, propone di creare, entro il 2020, un corpo di 10.000 agenti specializzati da distribuire lungo i confini europei per aiutare le Guardie di Frontiera e Costiere. Infine, reitera la necessità di creare un passaggio sicuro e legale per i migranti che necessitano di protezione internazionale.

Il capitolo si conclude ampliando il raggio di esame ed osservando la questione migratoria ed il ruolo delle ONG a livello globale. Relativamente a questa dimensione, è d'uopo

menzionare il rilevante ruolo del NGO Committee on Migration, un Comitato composto da diverse Organizzazioni Non Governative, la cui missione si focalizza sulla difesa, promozione ed educazione al rispetto dei diritti dei migranti, in accordo con la Carta delle Nazioni Unite. Questo Comitato nomina dei Sottocomitati, ciascuno dei quali si concentra su particolari temi. Per il biennio 2018-2020, essi sono la protezione dei diritti dei bambini migranti, la lotta alla xenofobia e la promozione dell'inclusione sociale, la corretta informazione riguardo gli effetti del cambiamento climatico e le migrazioni da esso causate, ed infine le negoziazioni per la stesura del Global Compact for Safe, Orderly and Regular Migration. Quest'ultimo documento, insieme al Global Compact on Refugees, rappresenta il primo accordo creato sotto gli auspici delle Nazioni Unite, che concerne tutti gli aspetti delle migrazioni. Inseriti fra gli obiettivi della Dichiarazione di New York del 2016, i due Global Compacts sono stati adottati nel 2018 e sono stati ampiamente sostenuti ed approvati da gran parte della comunità internazionale. Seppur di natura non vincolante, si presentano come simboli di grande importanza in quanto portatori di valori condivisi ed emblemi di impegni assunti verso una cooperazione internazionale su una questione così urgente e complessa. La presente tesi evidenzia i passaggi che hanno portato alla loro adozione e analizza i principali obiettivi racchiusi fra le righe dei due testi.

Il quarto ed ultimo capitolo si conclude tornando a riflettere sul ruolo delle ONG, questa volta a livello globale e non più esclusivamente Mediterraneo, in particolar modo proponendo delle riflessioni riguardo a quale potrebbe essere il futuro che attende le organizzazioni umanitarie. Il mondo odierno è in perenne cambiamento, sfide e difficoltà nuove potrebbero essere poste ad esempio dallo sviluppo della tecnologia, pertanto non è da escludere che il futuro possa riservare crisi umanitarie ad essa legate. Ciò che invece possiamo dare quasi per certo è l'aumento delle catastrofi provocate dai cambiamenti climatici, come alluvioni, siccità, aumento della temperatura o terremoti, la cui intensificazione negli anni è data ormai per assodata. Questo fattore contribuirà a generare nuovi flussi migratori ed emergenze che molto probabilmente richiederanno l'intervento delle ONG umanitarie. Un'ulteriore sfida che esse dovranno fronteggiare si racchiude nel così detto "paradosso della globalizzazione", il quale denota come, in un mondo sempre più interconnesso e globalizzato, si manifestino negli Stati crescenti tendenze all'isolamento, al nazionalismo, alla difesa della propria sovranità, le quali tendenze

portano gli Stati ad intraprendere misure volte alla protezione della propria cultura, della propria lingua e delle proprie tradizioni. Tali atti di chiusura potrebbero portare i governi ad assumere un atteggiamento sempre più diffidente ed intollerante verso le organizzazioni internazionali, volto a preferire tentativi atti a risolvere eventuali crisi dall'interno, piuttosto che affidandosi all'intervento di agenti esterni. Le ONG a questo si dovranno adattare, modificando il loro assetto e intraprendendo misure innovative, che innanzitutto si adeguino alle nuove sfide del futuro. Si dovranno inoltre riparare dalle solite diffidenze, ad esempio incrementando la trasparenza delle operazioni finanziarie e utilizzando, quanto più possibile, la tecnologia per promuovere l'informazione sulle loro attività, mantenendosi in stretto contatto con sostenitori ed altri attori coinvolti in ambito umanitario.

La tesi si conclude riportando il pensiero dell'attuale Segretario Generale di INTERSOS, Kostas Moschochoritis, il quale sostiene che nonostante i cambiamenti e le sfide del futuro, per chi fa parte di una ONG nessun ostacolo sarà grave abbastanza da convincerlo ad interrompere la sua attività, in quanto essa è mossa da un principio che va oltre il semplice voler procurare prima assistenza e beni di necessità, ma è radicato nel fondo dell'essere umano. Infatti, recuperando i versi del commediografo latino Terenzio risalenti al 164 a.C., egli afferma che l'uomo dovrebbe, proprio per sua natura, interessarsi a tutte le vicende umane ed essere sempre mosso dal desiderio di fare il suo massimo per prestare il proprio aiuto a qualsiasi suo simile in difficoltà. Si chiama sentimento di umanità.

INTRODUCTION

The ongoing migration crisis in the Mediterranean area and the frequent need for interventions to save people who try to cross the sea and reach European coasts are facts that everyone is aware of. Indeed, almost everyday media inform us about new cases of migrants in distress at sea and of European states which cannot decide how to manage this emergency. The present final thesis deals with these events and, in particular, it focuses on the fundamental role played by the NGOs which conducted search and rescue operations in this area from 2014 up to the present time.

This theme has been chosen according to its extremely topical importance, due to the frequent cases that involve migrants in the Mediterranean, as well as to the different controversies linked to rescue operations and reception procedures. Among these controversies, large debates are dedicated to NGOs, whose intervention and role are not free from criticism. Therefore, the dissertation aims at analysing all aspects which characterize NGOs' rescue actions and the way this migration crisis is faced at European level.

The text will be divided into four chapters. The first chapter is focused on the history of migration flows which characterized the Mediterranean area from the 1950s up to the present time. In addition, the legal framework governing migration at sea and asylum procedures is deeply analysed, both at international and European level. Lastly, the EU-Turkey Statement and the Memorandum of Understanding between Italy and Libya are analysed, as examples of European externalization of migration policies.

Subsequently, in the second chapter the search and rescue operations will be introduced, as well as the actors which undertake them in the Mediterranean area, i.e. the European Agencies and the NGOs. Some paragraphs will be dedicated to the latter, describing their legal status and characteristics, explaining the accusations that are often addressed to them, besides discussing the two Code of Conducts which were drafted in order to regulate their behaviours. The second chapter ends highlighting the controversial relation between NGOs and Libya, since the former often act in the territorial waters of the latter, on the basis of the country's disrespect of migrants' human rights. Precisely about this last subject, the third chapter focuses on the international and European legal framework which protects migrants' fundamental rights and it lists all the main Conventions in which they are enshrined. Furthermore, it focuses on the analyses of the aforementioned bilateral

agreements signed between the European Union and Tunisia, and between Italy and Libya, which contain within their provisions some failures to comply with humanitarian law. After examining also two important judgments questionable on the human rights point of view involving the European Union and some asylum seekers, the dissertation comes back to NGOs and focuses on their commitment to protect migrants' rights. The chapter ends with the description of some well-known events happened in 2018 in which the ProActiva Open Arms and SOS Méditerranée, after conducting search and rescue operations, were forced to stay at sea, since no coastal state agreed to open its ports.

The fourth and final chapter begins describing the retreat of NGOs from the Mediterranean Sea occurred in the late 2018, since the difficulties due to the closures of ports became increasingly harsh and the charges against NGOs became increasingly widespread. Nevertheless, migrants did not stop crossing the sea and tragedies at sea did not stop taking place. Therefore, some NGOs decided to start again with rescue operations, this time relying also on the aid of the Italian organization Mediterranea.

The dissertation continues by submitting some forecasts on possible changes the European Union could undertake in order to better manage migration flows.

Finally, the issue is considered at global level, and some considerations are made on the global approach towards migration, and on the possible impacts of the recently adopted Global Compact for Safe, Orderly and Regular Migration and Global Compact on Refugees. The dissertation ends with some observations on the possible future of humanitarian NGOs and the new challenges they may have to face.

CHAPTER I

THE MIGRATION CRISIS IN THE MEDITERRANEAN AREA

1. The current migration crisis and its evolution over the years.

The phenomenon of migration is a long-standing issue for European countries. Three main phases can be identified if we consider the period from the 1950s up to the present time¹. From the second post-war period, the former colonial powers, which were traditionally emigration countries, became countries of immigration². For instance, after the decolonization, the United Kingdom became the destination for people coming from Commonwealth countries, such as Pakistan, India, Nigeria, South Africa; while flows from Maghreb, Congo, Suriname, Indonesia, and the Antilles started to head towards France, Belgium, and the Netherlands. There are several factors that influenced these massive movements of people: first of all, the relations between the host countries and the countries of origin, the language and cultural affinity, then the favourable reception policies, but most of all, the determining factors were the favourable economic conditions that characterised North-Western Europe in the three decades after the end of the Second World War. For instance, from 1953 and 1958 European industrial production increased by 30%, while in France and Germany this increase reached 50%³. Nevertheless, the oil crisis of 1973-1974 had a great impact on European economic growth and drastically reduced the need for labour⁴. This led European countries to undertake policies aiming at stopping or reducing immigration flows, hence controls on entries increased and migration became a fundamental topic in national debates. The

¹ Christof VAN MOL and Helga DE VALK, *Migration and Immigrants in Europe: A Historical and Demographic Perspective*. At: Blanca GARCÉS-MASCAREÑAS and Rinus PENNINX, *Integration Processes and Policies in Europe*, IMISCOE and Springer, 2016, p. 31.

² Nadia OLIVIERI et al., *Andamenti demografici e fenomeni migratori nell'Europa contemporanea. Sintesi storica e focus didattici*, Novecento.org, n. 9, February 2018. Available at: <http://www.novecento.org/insegnare-leuropa-contemporanea/andamenti-demografici-e-fenomeni-migratori-nelleuropa-contemporanea-2935/> (Accessed: 27/09/2018)

³ Corrado BONIFAZI et al., *International Migration to Europe: New trends and new methods of analysis*. Amsterdam, Amsterdam University Press, 2008, p. 38.

⁴ Christof VAN MOL and Helga DE VALK, *Migration and Immigrants in Europe: A Historical and Demographic Perspective*, cit., p. 35.

economic recession and high unemployment rate also induced the spread of racism, while the number of asylum applications continued to rise: between 1970 and the end of the twentieth century the figure increased from 15,000 to more than 300,000 annually⁵. From the 90s migration flows grew again, after the collapse of the Iron Curtain and the end of the Cold War: new asylum seekers left mostly from Yugoslavia, Romania, Iraq and Afghanistan.

Finally, from 2000 onwards, millions of people started to flee to Western Europe by land or crossing the Mediterranean Sea. They came from North Africa and Asia, in particular from Libya, Somalia, Mali, Nigeria, Eritrea, Syria, Iraq, Yemen, Pakistan, Afghanistan, and Eastern Europe, for example, Ukraine. These are states in exuberant population growth and in conditions of economic backwardness, often exacerbated by the presence of dictatorial regimes, conflicts and civil wars.

As a response to these unprecedented migration flows, European immigration policies became even more restrictive, due to the unification of the European market which imposed visa regulations for foreigners and strict border controls even if this, rather than hindering migration flows, increased the phenomenon of illegal immigration and migrant smuggling.

Currently, besides economic reasons, there are different causes for migrants to leave: indeed, most of them are refugees or people expelled from their countries for political, religious or ethnic reasons. This is exactly what particularly characterises the current migration crisis that Europe is facing: there is a huge amount of people who can be identified as refugees and they outnumber asylum seekers and economic migrants. For this reason, this is called a “refugee crisis”.

The Convention Relating to the Status of Refugees⁶, also known as the 1951 Geneva Convention, provides the definition of refugee as

“[a person who] As a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is

⁵ Timothy J. HATTON, *Seeking asylum in Europe*. At: Economic Policy, Volume 19, Wiley, 2004, p.7.

⁶ UN, *Convention Relating to the Status of Refugees* (Geneva Convention), 28 July 1951. Available at: <http://www.unhcr.org/3b66c2aa10> (Accessed: 23/10/2018)

unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it⁷.”

These migration flows started to represent a serious crisis for European countries around 2015, when the number of arrivals reached the major peak. Currently the crisis is in a phase of mitigation, even if it still remains a matter of great importance and is still very difficult to handle, especially for countries bordering the Mediterranean Sea.

1.1 Recent data on migration flows in the Mediterranean area.

The United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) work closely together as established by the 1997 Memorandum of Understanding⁸, promote integrated policies, information activities and take care of the collection of data regarding migration flows as accurately as possible. For this last purpose, the IOM’s Global Migration Data Analysis Centre in December 2017 set up the Global Migration Data Portal in order to provide reliable migration statistics, easily accessible on an international level. In addition, the IOM supports the project Missing Migrants where the number of deaths, including refugees and asylum seekers, is registered from the beginning of the year to the current moment. Data are provided by Coast Guards, NGOs, Interior Ministers, medical operators and the mass media. Instead, the UNHCR hosts a Migrants Data Portal continuously updated thanks to the Field Information and Coordination Section, which registers the number of arrivals and dead at sea, monitors the different nationalities, gender and age of migrants, and offers focus on single countries or regions. UNHCR statistics are published every year in the Global Trends and Global Appeal reports. This agency has an office in Rome that is the Regional

⁷ UN, *Convention Relating to the Status of Refugees*, cit., art. 1(A)(2). Available at: <http://www.unhcr.org/3b66c2aa10> (Accessed: 23/10/2018)

⁸ UNHCR, *Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration*, 15 May 1997. Available at: <http://www.unhcr.org/4aa7a3ed9.pdf> (Accessed: 23/10/2018)

Representation for Cyprus, Malta, Italy, the Holy See, San Marino, Portugal, and Spain. Hence, the UNHCR pays a great deal of attention to migration flows taking place in this part of the world, and is committed to increasing awareness about asylum in Southern European countries.

According to UNHCR data, by the end of 2017 about 68,5 million people were forcibly displaced around the world as a result of wars, persecutions or violence⁹. With regard to the Mediterranean area, the countries which host the majority of migrants are Spain, Italy, Cyprus, and Greece, where the total arrivals estimated by the UNHCR in 2018 through 8 November are 105,415 people, of which 93,567 are refugees and migrants arriving to the aforementioned countries by sea and 5,848 to Spain by land. The estimate of dead and missing in 2018 amounts to 2,023 people. Most of the arrivals come from Guinea (11,2%) and Syria (10,1%); 20,9% are children, 14,2% are women and 64,9% are men¹⁰.

The following Figure 1 graphically depicts the number of migrants and refugees who arrived from 2014 to 2017 to the shores of Italy, Greece, and Spain, which are the Mediterranean countries most involved in migration flows.

⁹ UNHCR, *Global Trends: Forced displacement in 2017*. Available at: <http://www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html> (Accessed: 29/09/2018)

¹⁰ UNHCR, *Operational Portal, Refugee situations: Mediterranean situation*. Data as of 8 November 2018. Available at: <https://data2.unhcr.org/en/situations/mediterranean> (Accessed: 27/09/2018)

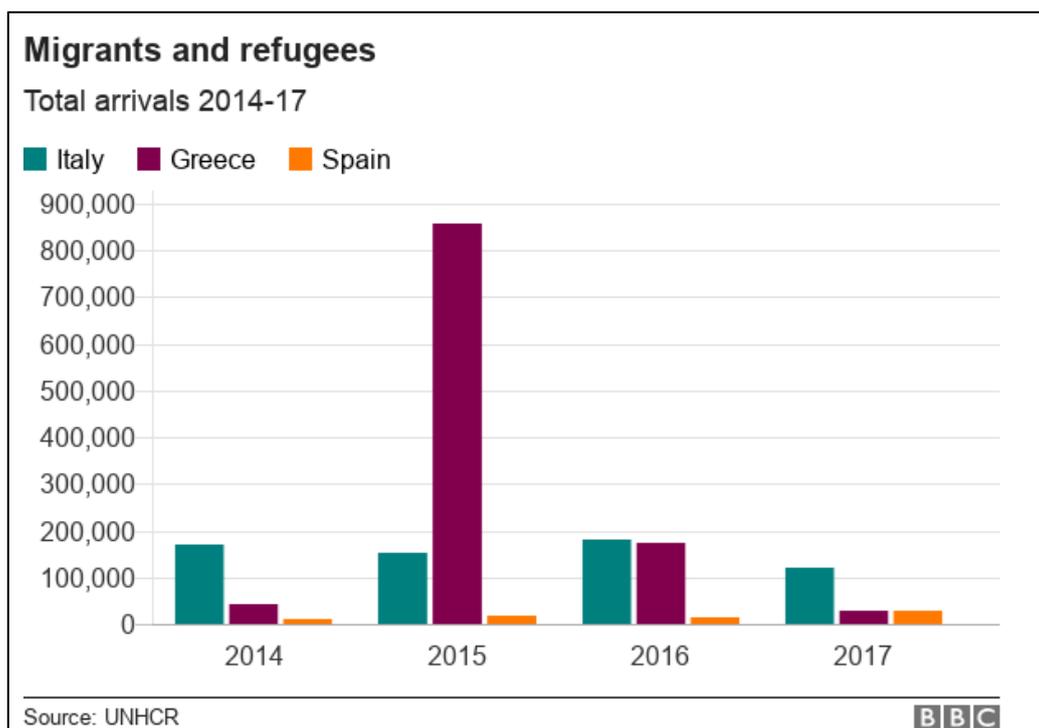


Figure 1: Total arrivals in Italy, Greece, and Spain from 2014 to 2017. Source: UNHCR data collected and represented in the graph by *bbc.com*¹¹.

As we can see, until 2017 Italy was the country that received the largest number of migrants, with the single exception of 2015. Indeed, in that year more than 800,000 migrants arrived in Greece and they mainly came from Turkey. After 2015 the number fell, since on 18 March 2016 the European Union Heads of State or Government and Turkey signed a Statement aimed at stopping the irregular migration flows via Turkey to Europe. The EU-Turkey deal will be discussed in the last paragraphs of this first chapter, as well as in chapter III.

In the following Table 1, instead, it is possible to notice and compare the total amounts of sea arrivals and dead and missing in the same period, with regard to the Mediterranean area as a whole.

¹¹ *Migration to Europe in chart*, BBC, 11 September 2018. Available at: <https://www.bbc.com/news/world-europe-44660699> (Accessed: 15/10/2018)

Years	Sea arrivals	Dead and missing
2017	172,324	3,139
2016	363,425	5,096
2015	1,015,877	3,771
2014	215,690	3,538

Table 1: Sea arrivals and Dead and missing from 2014 to 2017. Source: table independently created with the data provided by the UNHCR¹².

As is evident from these data, between 2014 and 2016 there was a huge escalation of migration flows towards the Mediterranean shores, with a significant peak in 2015 when the number exceeded one million arrivals, whereas from 2017 they have started to decrease. Instead, regarding the number of deaths recorded in the Mediterranean Sea, the estimated number has registered no significant changes, except for 2016, when the highest number of deaths was recorded.

This high loss of life proves the enormous complexity for European countries to manage migration flows and search and rescue operations.

2. International legal framework governing migration at sea.

The commitment to saving lives at sea is a mandatory obligation for every state and prevails over all bilateral or multilateral agreements aiming at fighting irregular migration. The attempt to define international waters has been stratified in a series of international, national and customary rules. In this regard, an important turning point was the establishment in 1948 of the International Maritime Organization (IMO), the United Nations specialised agency which is responsible for the safety of life at sea, security and protection of maritime environment. Currently it has 174 members and three associated members¹³. The IMO provides support and guidance to member governments on matters

¹² UNHCR, *Operational Portal, Refugee situations: Mediterranean situation*, cit.

¹³ IMO, *Member States, IGOs and NGOs*. Available at: <http://www.imo.org/en/About/Membership/Pages/Default.aspx> (Accessed: 07/02/2019)

relating to the implementations and the applications of the numerous existing international Conventions about maritime and refugee law. The following paragraphs will analyse the most important of them, in a chronological order.

2.1 The International Convention for the Safety of Life at Sea (SOLAS).

The International Convention for the Safety of Life at Sea (SOLAS)¹⁴ is generally considered the most important treaty concerning the safety and security of ships, with a specific reference to the protection of human life.

The first version was adopted in London on 20 January 1914 as a result of the necessary security measures to be taken after the Titanic disaster which occurred two years earlier. Then, it was updated and amended in three more versions - respectively in 1929, 1948 and 1960 - until 1 November 1974, when the fourth and last version was defined and has been in force since 25 May 1980. Currently, the SOLAS Convention has 164 State Parties¹⁵.

Its main objective was to establish minimum standards for the equipment and the construction of ships in order to guarantee their safety. It includes provisions for all vessels and specific measures for passengers, cargo ships and tankers.

Concerning life-saving arrangements, provisions are defined in Chapter III, on which the Life-Saving Appliance (LSA) Code is based, adopted by the IMO's Maritime Safety Committee on 4 June 1996 through Resolution MSC.48(66)¹⁶.

The Convention includes requirements for life jackets and rescue boats. Moreover, in Chapter V it identifies navigation safety services, such as meteorological services for ships and maintenance of search and rescue services. Furthermore, this Chapter requires the master of a ship to assist people in distress. This Convention was the first

¹⁴ Inter-Governmental Maritime Consultative Organization, *International Convention for the Safety of Life at Sea (SOLAS)*, 1 November 1974. Available at: <http://www.ifrc.org/docs/idrl/I456EN.pdf> (Accessed: 02/02/2019)

¹⁵ IMO, *Status of Treaties*, 8 January 2019. Available at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> (Accessed: 02/02/2019)

¹⁶ *LSA-Code International Life-saving appliance Code (MSC.48(66))*, 1 July 1998. Available at: https://puc.overheid.nl/nsi/doc/PUC_2393_14/5/ (Accessed: 1/02/2019)

internationally drafted to regulate safety at sea. Subsequently, the issue was better delineated by further international treaties which regulated other aspects of the subject.

2.2 The Convention Relating to the Status of Refugees.

The Convention Relating to the Status of Refugees, also known as the Geneva Convention, is the key instrument relating to the protection of refugees and still represents the highest point on the development of international refugee law¹⁷. This treaty was adopted on 28 July 1951 in Geneva and it was set up with the aim of providing a legal framework for the protection of European refugees after the Second World War. Events of that period, in particular the struggle for independence of colonized nations, showed the limits of previous instruments and the need to improve the protection of this category. As a consequence, the UN started a process which led to the drafting of this Convention with legally binding commitments and to the institution of the United Nations High Commissioner for Refugees (UNHCR).

On 31 January 1967 an Additional Protocol was adopted and the temporal limitations of the Convention were abrogated¹⁸, since it covered only those persons who became refugees before 1 January 1951¹⁹. However, the Protocol did not remove the geographical limitations. Indeed, article 1(3) affirms that states which were already Parties to the Convention shall maintain the declarations made according to article 1(B)(2)²⁰.

As in the inter-war arrangements, the condition of refugees is essentially characterized by the fact that they are outside their country of origin and they need protection by another state. The Convention in its article 1(A) added to the determination of the refugee status the condition of a well-founded fear of persecution based on race, religion, nationality, membership of a specific social group or political opinion. Therefore, the term “refugee”

¹⁷ Agnès HURWITZ, *The Collective Responsibility of States to Protect Refugees*. Oxford; New York: Oxford University Press, 2009, p. 13.

¹⁸ As January 2019, the Protocol has 147 State Parties, while the Geneva Convention has 146 Parties and 19 Signatories. Source: United Nations Treaty Collection.

¹⁹ UN, *Convention Relating to the Status of Refugees*, cit., article 1(A)(2).

²⁰ Article 1(B)(2) of the Geneva Convention requires states to choose to apply the Convention provisions for: (a) events occurring in Europe; (b) events occurring in Europe or elsewhere. Each state which adopted alternative (a) may at any time choose alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

shall apply to those persons who, according to such fear of persecution, are unable or unwilling to return to their country of origin. In addition, article 1 sets out the conditions for the exclusion from such protection, and for the cessation of this status.

It is worth noting that article 1(A)(2) provides a definition of refugee which can raise a few comments. Firstly, according to it, the refugee shall have a well-founded fear of persecution, nevertheless the article does not specify if the fear should be assessed considering the refugee's perception or objective elements. On this regard, the UNHCR affirmed that fear is subjective, hence what should be considered is the person's state of mind. In fact, much of the legal theory disagrees with this statement, sustaining that for the assessment of the risk of persecution objective elements should be considered. Secondly, the Convention does not specify what a persecutory act means. In addition, not all kinds of persecution may qualify a person as a refugee, but only those stemming from one of the grounds established by article 1(A)(2).

The Convention establishes the rights that states shall grant to refugees depending on their "simple" presence, on their lawful presence, and on lawful or habitual residence²¹. The differences among these categories have an impact on the level of protection provided by the Convention: the stronger the link with the host state, the more extensive the rights of refugees (for instance, the right of association, the right to housing, etc.)²².

It is important to underline that individuals who fall within the definition of article 1(A)(2) are *ipso iure* refugees since the recognition of the refugee status has no constitutive nature but merely of assessment: the individual becomes a refugee once he fulfils the criteria of article 1(A) of the Convention²³. However, although states have ample room of manoeuvre concerning the assessment procedures²⁴, they are subject to procedural and substantial obligations aimed at protecting from arbitrariness the position of a refugee, even before he is recognized as such. For instance, an obligation for states results from article 31, which proscribes the imposition of penalties for the illegal entry of refugees who arrive from a territory where their life or liberty is threatened. Furthermore, states

²¹ Agnès HURWITZ, *The Collective Responsibility of States to Protect Refugees*, cit., p. 14.

²² Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, Bari, Cacucci Editore, 2012, pp. 3-4.

²³ Ivi, p. 2.

²⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, par. 189. Available at: <https://www.unhcr.org/4d93528a9.pdf> (Accessed: 16/01/2019)

are limited by article 33 of the Convention, which expresses its core principle: it forbids the expulsion or return of refugees to a country in which their life would be at risk on the grounds laid down in article 1. This is called the principle of non-refoulement.

2.2.1 The principle of non-refoulement.

One of the cornerstones of international migration law, which affects the management of the SAR activities, is enshrined in the 1951 Convention Relating to the Status of Refugee, which in article 33(1) states the prohibition of return (the so-called *refoulement*) of an asylum seeker or a refugee

“in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion²⁵.”

The term “whatsoever” means every kind of forcible removal, including extradition, deportation, expulsion and informal transfer²⁶.

Concerning the application of the norm, article 33(1) raises several issues. Among these, there is the need to clearly identify the territorial extension of the principle. In fact, in the early period after the adoption of the Convention, the application of the principle was excluded for individuals who had not yet entered the territory of a contracting state. Therefore, rejection at the borders was allowed²⁷. Nevertheless, over the years a doctrine developed and consolidated a broader concept of the non-refoulement principle: it started to include in its application also the rejections at borders. It follows that a state shall always temporarily accept an applicant, as long as checks are made in order to define

²⁵ UN, *Convention Relating to the Status of Refugees*. Article 33(1). Available at: <http://www.unhcr.org/3b66c2aa10> (Accessed: 12/10/2018)

²⁶ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*. Available at: <http://www.unhcr.org/4d9486929.pdf> (Accessed: 10/10/2018)

²⁷ Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, cit., p. 45.

whether he is worthy of protection or he may be return²⁸. This provision is supported by several elements. For instance, article 31(1) of the Convention implies a right of temporary entry for asylum seekers. In particular, it forbids the adoption of any penalties towards refugees who illegally entered the territory of the state, when they come from a country in which their life and freedom were threatened. Moreover, article 31(2) adds that states shall not apply restrictions to the movements of such refugees, allowing them reasonable time and necessary facilities in the case they need to obtain admission in another country. Therefore, if refugees legally arrived at the borders could be expelled, this would create a paradox, since who enter in an illegal way would instead be protected according to the abovementioned article. For this paradox to be avoid, the contracting state, whenever wants to expel a refugee arrived at its borders, must always first ascertain that in the country of destination that person is not at risk. This implies that a state shall always temporarily allow an applicant arrived on its territory. In this way, the state shall proceed at the status assessment: The Convention, by forbidding the refoulement of refugees, requires their identification²⁹. Therefore, the status verification procedure is the primary instrument to pursue the main objective, the non-refoulement prohibition. The status verification, according to both doctrine and practice, shall result from a fair procedure, consistent with the due process law, since the state shall acquire all necessary information so as not to violate the non-refoulement principle.

One of the main issues with which states frequently circumvent the non-refoulement principle is linked to the definition of “safe country”. In fact, a stratagem often used consists in expelling a migrant towards a country he has a relation with. For instance, links may be citizenship, residence, or presence of family members. Instead, the non-refoulement principle is based on different elements, for instance, on the respect of the principle itself by the country of destination. In fact, according to the UNHCR,

“In determining whether a country is “safe”, states should take into account the following factors: its respect for human rights and the rule of law, its record of not producing refugees, its ratification and compliance with human rights instruments and its accessibility to independent national or

²⁸ Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, cit., p. 46.

²⁹ Ivi, p. 61.

international organisations for the purpose of verifying and supervising respect for human rights.³⁰”

Moreover, the UNHCR requires the state to make sure that the country of destination, besides having a sufficient link with the applicant, is ready to host him and to examine its application with a fair procedure³¹.

Nevertheless, the obligation set up by the non-refoulement principle in the Refugee Convention has no absolute character, but it is subject to an exception. Indeed, it ceases in the event that the refugee may actually represent a danger to the security of the host country or when, having been convicted by a judgment of a serious crime, he may represent a threat for the community of the country (article 33(2)).

The concept of non-refoulement is strongly linked to the international human rights law that will be analysed in more detail in chapter III.

2.2.2 The principle of non-refoulement as international customary law.

The principle of non-refoulement represents one of the most important component of international refugee protection and an essential article of the Geneva Convention, to which no reservation is permitted. Furthermore, the UNHCR asserts that the prohibition of refoulement fulfils the requirements enshrined in the Statute of the International Court of Justice, which defines “international customs, as evidence of a general practice accepted as law³²”. In order to become part of international customary law, an objective and a subjective element are required: the former corresponds to a consistent, uniform and prolonged practice (*diuturnitas*), the latter to a common *opinio juris*, according to which states develop the belief that they are legally bound to perform the principle. Since it is possible to affirm that both these criteria are satisfied, it is possible to affirm that the

³⁰ UNHCR, *UNHCR Position Relating to the Resolution on Safe Countries of Origin*, December 1992. Available at: <https://www.refworld.org/docid/3fa7c4f04.html> (Accessed: 10/12/2018)

³¹ UNHCR, *Considerations on the “Safe Third Country” Concept*, July 1996. Available at: <https://www.refworld.org/docid/3ae6b3268.html> (Accessed: 10/12/2018)

³² UN, *Statute of the International Court of Justice*, 24 October 1945, article 38(1)(b). Available at: <https://www.icj-cij.org/en/statute> (Accessed: 30/01/2019)

non-refoulement principle constitutes a rule of international customary law, of imperative and mandatory nature³³. As proof of its common acceptance, the principle is mirrored in several international agreements mainly aiming at protecting human rights, in which it is related to the prohibition of torture and inhuman treatment, that will be discussed in more detail in chapter III. However, its inclusion in several agreements supports its status of international customary law. Moreover, a great deal of states has incorporated deals enshrining the non-refoulement principle also within their internal legal order and legislation. This is another evidence of states' *opinio juris sive necessitatis* about the principle. Furthermore, even Conclusions of the UNHCR Executive Committee can be taken as additional expressions of the international community opinion.

Therefore, giving also the absence of expressed objections by any states, it is possible to declare its customary nature. As a consequence, the non-refoulement principle is binding on all states, including those which are not parties to the 1951 Refugee Convention or its 1967 Protocol³⁴.

Considering the practice of states in regard to this principle, it should be underlined that its application is wider than the provisions of article 33, since the principle is applied irrespective of whether or not a person has been formally documented as a refugee. Therefore, the principle in its customary nature must be observed also by those states which have not defined a procedure for determining refugee status³⁵.

By definition, the non-refoulement principle applies to people that are under the jurisdiction of a state: within its territory and its territorial sea. However, UNHCR in an Advisory Opinion³⁶ asserted that the principle must be applied also extraterritorially, including during search and rescue operations in the high seas. In particular, regarding European States, the non-refoulement obligation can be found in article 3 of the European

³³ Bruno NASCIMBENE, *Asilo e status di rifugiato*, at AIAF, Rivista n° 2/2010, pp. 4-30; Federico LENZERINI, *Il principio del non-refoulement dopo la sentenza Hirsi della Corte Europea dei diritti dell'uomo*, at RDI, 2012, p. 731 et seq. These authors explain the mandatory nature of the non-refoulement principle on the basis of its close relation with the prohibition of torture, which is a norm of general international law and it has binding and mandatory nature. This concept will be analysed in more detail in Chapter III of the thesis.

³⁴ UNHCR, *Global Trends: Forced displacement in 2017*, cit.

³⁵ UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)* EC/SCP/2, 1997, par. 16 and 17. Available at: <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> (Accessed: 09/10/2018)

³⁶ UNHCR, *Global Trends: Forced displacement in 2017*, cit.

Convention on Human Rights, where it is recognized as an obligation beyond state territory and a constraint on state sovereignty in relation to the control of migration flows on the high seas. The European Court of Human Rights thus has challenged the traditional concept of sovereignty and jurisdiction, at the same time making a breakthrough in the protection of refugees intercepted by states in the high seas.

2.3 The International Convention on Maritime Search and Rescue (SAR).

Among the agreements that regulate the rescue operations at sea it is fundamental to include The International Convention on Maritime Search and Rescue (SAR)³⁷, signed in Hamburg on 27 April 1979 and entered into force on 22 June 1985. Currently, it has 112 States Parties³⁸. According to the definition provided by the IMO, the Convention

“was aimed at developing an international SAR plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations³⁹.”

On the basis of this Convention, the IMO’s Maritime Safety Committee has divided the global maritime space into several areas, in each of which a different country is responsible for providing search and rescue services.

A revised Annex of amendments to the Convention was adopted in 1998 and includes five Chapters aimed at emphasizing governments’ responsibilities, and coordination between aeronautical and maritime SAR operations. In particular, Chapter II requires parties to establish basic elements of search and rescue service, including legal framework, assignment of responsibility and communication facilities.

³⁷ UN, *International Convention on Maritime Search and Rescue (SAR)*, 27 April 1979. Available at: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3> (Accessed: 30/01/2019)

³⁸ IMO, *Status of Treaties*, cit.

³⁹ IMO, *International Convention on Maritime Search and Rescue*. Available at: [http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx) (Accessed: 02/10/2018)

On 20 May 2004 through the Resolution MSC.155(78)⁴⁰ some amendments were made to the SAR Convention and entered into force on 1 July 2006. In order to provide guidance to the government authorities who have to put these amendments into practice, Guidelines on the Treatment of Persons Rescued at Sea have been drawn up with Resolution MSC.167(78)⁴¹. Considering border controls, sovereignty and security concerns, the main priority is that “all persons in distress at sea should be assisted without delay⁴²”. The Guidelines require the state that leads the rescue operations to provide a safe place, which is defined as a place where migrants’ life and freedom are not threatened, their basic needs can be satisfied, and their transport to the final destination can be smoothly organized. Moreover, any procedure, such as the identification and the definition of the status of migrants, shall not be allowed whenever this could hinder assistance or delay the disembarking.

2.3.1 The Search and Rescue Regions.

A Search and Rescue Region in the SAR Convention is defined as “An area of defined dimensions within which search and rescue services are provided⁴³”. In the adopted amendments to the Convention, the sentence “associated with a rescue coordination centre⁴⁴” was added to the definition.

⁴⁰ Annex 5 Resolution MSC.155(78), (Adopted On 20 May 2004,) *Adoption of amendments to the International Convention on Maritime Search and Rescue, 1989, as amended*. Available at: <http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.155%2078.pdf> (Accessed: 07/02/2019)

⁴¹ Annex 34 Resolution Msc.167(78), (Adopted On 20 May 2004), *Guidelines on The Treatment of Persons Rescued at Sea*. Paragraph 3.1. Available at: <https://treaties.un.org/doc/publication/unts/volume%201405/volume-1405-i-23489-english.pdf> (Accessed: 20/10/2018)

⁴² Ivi, par. 3.1.

⁴³ IMO, *International Convention on Maritime Search and Rescue*. Annex, Chapter I, article 1. Available at: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3> (Accessed: 28/10/2018)

⁴⁴ *Amendments to the International Convention on Maritime Search and Rescue of 27 April 1979. Concluded London, 18 May 1998*. Annex, Chapter I, article 4. Available at: <http://www.ifrc.org/docs/idrl/I454EN.pdf> (Accessed: 30/01/2019)

Chapter II of the document in paragraph 2.1.1 et seq. requires a clear definition of areas of intervention for each state, that shall be established by agreement and then communicated to the IMO's Secretary General.

The responsibilities for search and rescue operations in the Mediterranean area were shared among the coastal states during the IMO's Conference held in Valencia in 1997. On this occasion the General Agreement on a Provisional SAR plan was adopted and the specific limits of the SAR zones for each country were defined.

The International Maritime Organization and the International Civil Aviation Organization designated a Rescue Coordination Centre (RCC) and a Maritime Rescue Coordination Centre (MRCC) in each state bordering the Mediterranean shores, in order to coordinate and supervise the rescue operations along with the Coast Guard. These Centres have the duty to support effective operational and coordination programs for the purpose of facing any type of situation, such as rescue operations, disembarkation of people rescued, transport to a safe place, coordinating with other authorities (customs authorities, border control authorities, etc.) while rescued people are still on board the vessel that is providing assistance, taking measures to avoid undue delays, financial burdens or any other difficulty deriving from the aid of people at sea.

Despite the division of responsibilities, in cases of urgency and necessity, even within the territorial waters, rescue activities can be conducted by another state, when the state in charge is not able to intervene with the timeliness necessary to guarantee the protection of human life at sea⁴⁵.

2.3.2 The division of the areas of responsibility among the Mediterranean states.

In Figure 2 it is possible to see the division of the Mediterranean Sea in Search and Rescue Regions among the coastal states.

⁴⁵ IMO, *International Convention on Maritime Search and Rescue, 1979*, Chapter III, par. 3.1.2. Available at: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3> Accessed: (29/10/2018)

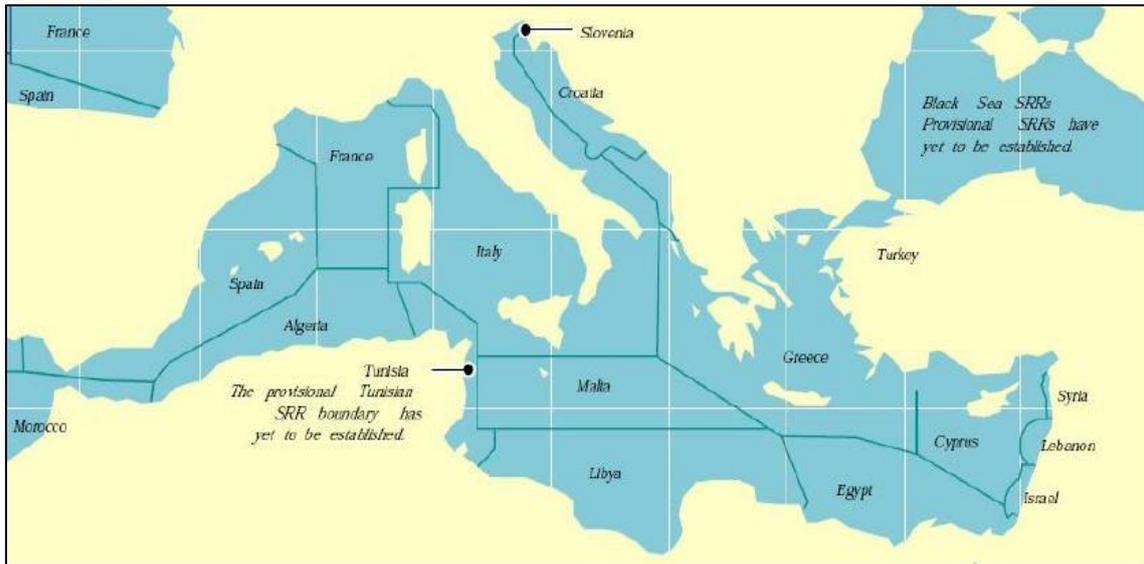


Figure 2: Search and rescue regions in the Mediterranean according to the 2004 amendments (International Maritime Organization Ocean Atlas). Source: Tanja AALBERTS, *Sovereignty at Sea: the Law and Politics of Saving Lives at the Mare Liberum* ⁴⁶.

Italy is responsible for 500 square kilometres, corresponding approximately to a fifth of the Mediterranean area⁴⁷. The Greek SAR area coincides with the Athinai FIR (Flight Information Region under the control of Athens)⁴⁸. Spanish SAR Region covers about 1,5 million square kilometres and involves also the Strait of Gibraltar and the Canary Islands⁴⁹. The government of Malta is an exception. Indeed, despite the fact that Malta is in charge of 250,000 square kilometres which comprehend also Italian territorial waters of the Pelagian Islands, including Lampedusa, it has hardly ever carried out any search and rescue operation, and it has almost always requested assistance from Italy to intervene in the area. The issue concerns the fact that Malta has not accepted the 2004 amendments to the SOLAS and the SAR Conventions regarding provisions on rescue and duties of the

⁴⁶ Tanja AALBERTS, *Sovereignty at Sea: the Law and Politics of Saving Lives at the Mare Liberum*, October 2014. Available at: https://www.researchgate.net/figure/Search-and-Rescue-Regions-SRR-in-the-Mediterranean-according-to-the-2004-amendments_fig2_280880592 (Accessed: 03/10/2018)

⁴⁷ Italian Coast Guard Headquarters, *Migration flows in the Mediterranean Sea and Search and Rescue*, 2015. Available at: <http://www.imo.org/en/About/Events/Documents/migrantspresentations/t%20Italy%20final%20presentati on.pdf> (Accessed: 29/10/2018)

⁴⁸ Hellenic Republic Ministry of Foreign Affairs, *Search and Rescue*, June 2018. Available at: <https://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/search-and-rescue.html> (Accessed: 29/10/2018)

⁴⁹ Jon DUKE, *Saving lives in Spain*, in Vertical Magazine, 21 November 2017. Available at: <https://www.verticalmag.com/features/saving-lives-spain/> (Accessed: 29/10/2018)

RCC Responsible for a specific SAR Region, so Italy has been involved in the operations held also in that part of the sea⁵⁰.

Moreover, Libya officially declared its search and rescue area only in June 2018 and established in that period its Joint Rescue Coordination Centre, a special type of RCC operated by civilian and military services. Before that date, migrants near the Libyan shores referred to the Italian Maritime Rescue Coordination Centre.

Tunisia still refrains from declaring to the International Maritime Organization the boundaries of its own SAR area.

2.3.3 The experts' opinions about search and rescue activities in the Mediterranean.

In March 2016, in Sanremo, Italy, the International Institute of Humanitarian Law (IIHL) with the support of the UNHCR and the IOM held a workshop regarding the search and rescue operations in the Mediterranean, in the presence of practitioners and experts of SAR services, naval and Coast Guard authorities, international organizations, NGOs and regional bodies⁵¹. Among the various topics discussed, the participants remarked that the SAR activity by itself cannot be considered the solution to the migration crisis, but only a part of the whole approach: this comprehends the fight against smuggling and traffic of humans, cooperation and harmonization of practices among countries and RCCs, effective international support for the needs of migrants arriving by sea, and effective lifesaving measures. It has been stated that SAR coordination has been enhanced throughout the years, however, there is still a number of possible gaps in the system. Among these gaps, for instance, there are still cases of RCCs in neighbouring states using different approaches towards the concept of “distress situation” and this sometimes causes serious delays in the rescue operations. So, it was suggested that guidance should be given on how the concept of distress should be applied. Moreover, some participants

⁵⁰ According to the 2004 amendments, Chapter 6, paragraph 6.7 claims that the RCC Responsible for the SAR Region, when informed about the situation of necessity, should immediately accept its responsibility and coordinate all rescue efforts and arrangements in order to identify a safe place for survivors.

⁵¹ UNHCR, IOM, IIHL, *Workshop on Search and Rescue of refugees and migrants in the Mediterranean: Practitioners' perspective*. June 2016. Available at: <http://www.refworld.org/pdfid/5731bd444.pdf> (Accessed: 27/10/2018)

affirmed that in order to ensure a more predictable SAR response, it may be useful to create an international SAR mission which could meet the SAR needs in the short-term. Finally, they underlined the importance of enhancing first-reception conditions for migrants and implementing infrastructures which at present are often inadequate but should be suitable for hosting the large number of people arriving.

2.4 The United Nations Convention on the Law of the Sea (UNCLOS).

The management of rescues at sea necessarily depends on the management of maritime spaces. In this regard, The United Nations Convention on the Law of the Sea (UNCLOS)⁵² establishes countries' rights and duties towards all seas and oceans and their resources, broadly reproducing customary law in this sector. It was signed in Montego Bay, Jamaica, on 10 December 1982 and came into force on 16 November 1994. Currently, it counts 168 State Parties⁵³ including the European Union, which both signed and ratified the Convention. According to article 311(1), it replaces the four previous Geneva Conventions on the Law of the Sea of 29 April 1958.

First of all, the UNCLOS introduced a subdivision of the maritime space in different sections starting from the country's baseline, as illustrated in the following Figure 3. Each section is subject to a specific legal regime.

⁵² UN, *United Nations Convention on the Law of the Sea* (UNCLOS), 10 December 1982. Available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁵³ UN, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements* (UNCLOS), 3 April 2018. Available at: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (Accessed: 02/02/2019)

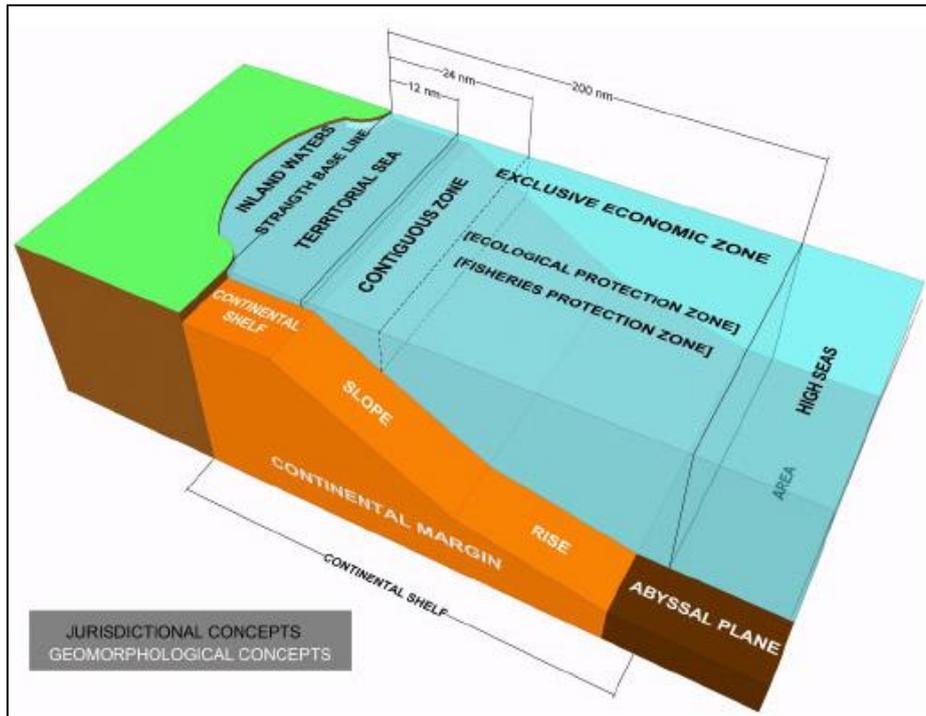


Figure 3: The division of maritime space. Source: Juan Luis SUÁREZ DE VIVERO, *Jurisdictional Waters in The Mediterranean and Black Seas* ⁵⁴.

The UNCLOS has established a state's full sovereignty and jurisdiction over its inland waters and its territorial sea (article 2) which extends up to 12 nautical miles (article 3). The contiguous zone must not exceed 24 nautical miles and, in this area, the state can exercise various political functions, such as customs, health, fiscal and immigration measures (article 33). Furthermore, in this area the state has broad coercive powers (article 73(1)). The coastal state has exclusive sovereign rights over its economic zone, which extends up to 200 nautical miles (article 55 et seq.), and where it can exercise exploration activities and exploitation of natural resources. Beyond this section the high sea extends, where states are framed by international law and none of them can exercise full sovereignty and jurisdiction (article 88).

In addition, the UNCLOS introduced the International Tribunal for the Law of the Sea, an independent judicial body which adjudicates disputes regarding the application and the interpretation of the Convention.

⁵⁴ Juan Luis SUÁREZ DE VIVERO, *Jurisdictional Waters in The Mediterranean and Black Seas*, Brussels, European Parliament study, 2009, p. 27. Available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-PECH_ET\(2009\)431602](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-PECH_ET(2009)431602) (Accessed: 02/02/2019)

Regarding the issue of rescue operations, the Convention explicitly states in article 146 that all necessary measures shall be taken to ensure protection of human life at sea.

Moreover, article 98(1) provides that

“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him⁵⁵.”

Finally, article 98(2) requires all the coastal states to promote effective search and rescue service and cooperate with neighbouring states for this purpose when necessary, recalling the principles of the SAR Convention mentioned above.

3. European legal framework governing migration.

States of the European Community began to cooperate on migration and asylum issues approximately in the 1980s, and this process culminated with the creation of the Amsterdam Treaty in 1997⁵⁶. As a consequence of this historical development, expert fora to organize intergovernmental cooperation were created, even if states remained partly reluctant to renounce their prerogatives to the Community on these sensitive issues. The establishment of a common European Union policy in the asylum and immigration field was overshadowed by the security discourse. Indeed, the core narrative of European policy makers focused on the fact that together with terrorists and criminals, asylum seekers raised security concerns. As a consequence, compensatory measures to the abolition of checks at internal borders were required.

⁵⁵ UN, *United Nations Convention on the Law of the Sea (UNCLOS)*, cit., article 98(1).
(Accessed: 15/10/2018)

⁵⁶ Agnès HURWITZ, *The Collective Responsibility of States to Protect Refugees*, cit., p. 30.

The abolition of checks within the Union was established in 1985 through the Schengen Agreement⁵⁷, which allowed the free movement of the citizens of Member States in the so-called “Schengen area”, and included the definition of specific procedures for issuing visas, combating illegal migration and reinforcing police cooperation. Nevertheless, the agreement did not provide measures regarding the exam of asylum applications. The next year, the Single European Act was signed, which provided the creation of the common market, and it was implemented by article 8(A) of the EC Treaty, which stated that this common market shall be an area with no internal frontiers. On the basis of these provisions, the European Commission proposed the adoption of a common policy on asylum⁵⁸. According to the Commission, the free movement of persons was not exclusively economic, and the abolition of checks at the borders was fundamental as a symbol of a united area, where people may move freely as citizens of a single community. On the basis of the concept of political union, the Commission affirmed the necessity of a joint response to the asylum issue as a whole. This idea was shared by the European Parliament, which supported the need to create an integrated area in which asylum seekers may benefit from the same rights. In this regard, the strengthening of cooperation among states was a fundamental element to manage the growing number of asylum seekers arriving to European borders. In order to achieve this political union on the issue, several documents were drafted.

3.1 The Treaty of Amsterdam.

As established by the final provisions of the Maastricht Treaty⁵⁹, on 29 March 1996 in Turin Heads of State and Government of the European Union convened an intergovernmental Conference in order to modify and update the Treaty itself, with the aim of allowing states to better face future challenges, such as the fight against terrorism,

⁵⁷ *Schengen Agreement*, between the Governments of the states of The Benelux Economic Union, the Federal Republic of Germany and the French Republic, 14 June 1985. Available at: https://www.ucc.ie/archive/hdsp/Shengen-agreement_io.pdf (Accessed: 31/01/2019).

⁵⁸ Agnès HURWITZ, *The Collective Responsibility of States to Protect Refugees*, cit., p. 30.

⁵⁹ EU, *Treaty on European Union (Maastricht Treaty)*, 7 February 1992, article N(2). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992M/TXT&from=IT> (Accessed: 18/01/2019)

the globalization of economy and its implications on employment, ecological imbalances, etc.

After long negotiations, the Treaty of Amsterdam (or to give its full name, The Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts) was signed on 2 October 1997 and entered into force on 1 May 1999. It may be seen as a clear example of the lack of common vision of European Member States, particularly concerning institutional issues⁶⁰. It consists of thirteen additional Protocols, fifty-one Declarations adopted by the Conference, and eight Declarations by Member States. Articles from 1 to 5 list the amendments which, according to the Parties, needed to be applied to the Treaty of European Union, the EC Treaty, the European Coal and Steel Community Treaty (which expired in 2002), the Treaty establishing the European Atomic Energy Community (EURATOM), and the Act concerning the election of the representatives of European Parliament.

Concerning asylum and migration, the Maastricht Treaty included provisions in the so called “Third Pillar⁶¹”, which included the need to create a common approach towards the fight of irregular migration and terrorism, to regulate crossing of external borders, to create a European police (Europol), and to adopt a common policy on asylum. The Amsterdam Treaty had the function of moving almost all the issues covered by the Third Pillar to the First, hence into the Community law, precisely within the new Title IV of the Treaty⁶². From this moment onward, decisions about asylum were made through a supranational system which applies the Community methods, and no longer through an intergovernmental system. Nevertheless, this community policy was not free from compromises, since several states did not accept to cede control over migration policies and could decide to stay out of Title IV or of Schengen norms.

⁶⁰ Girolamo STROZZI, Roberto MASTROIANNI, *Diritto dell'Unione Europea*, Torino, G. Giappichelli Editore, 2011, p. 15.

⁶¹ The First Pillar concerned the creation of a European Community with a single market and an economic and monetary union; the Second Pillar focused on a common foreign policy; the Third Pillar aimed at building a European area of freedom, security and justice, with police and judicial cooperation against crimes.

⁶² Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, cit., p. 149.

The Treaty of Amsterdam established that, within 5 years after its entry into force, the Council had to set the abolition of any check at internal borders, define the conditions for crossing external borders and for the residence of third-country nationals for stays no longer than 3 months. In addition, it had to take specific measures concerning asylum and immigration⁶³.

Article 63 TEC provided the competences for asylum on the basis of the Geneva Convention, and article 63(1) specified four aspects concerning asylum for which the Council shall deliberate, i.e. criteria regarding the responsible state for the exam of asylum applications, minimum standards for the reception of asylum seekers, for the qualification of an individual as a refugee, and for granting or withdrawing refugee status. Article 63(2) enshrined competencies to achieve a balance of efforts among states which host refugees and displaced persons. In addition, article 63(3)(a) called on the Council to adopt provisions on the issuance of visas and residence permits. This article also provided some directions for the establishment of the Common European Asylum System, focusing on four important categories: refugee status, temporary protection for refugees and displaced persons, international protection and protection of asylum seekers.

Among the innovations aimed at safeguarding fluency in the decision-making system within the Union, the need for Member States to establish a *strengthened cooperation*⁶⁴ became important. It had long been discussed if the set objectives needed to be pursued by all Member States together, or eventually by those states which wanted or were able to achieve them before the others, in order not to halt or delay the integration process. This phenomenon of differentiated or flexible integration has been defined as “Europe à la carte”, “Variable geometry Europe”, or “two-speed Europe”. On the one hand, it allows the process of strengthened cooperation and solidarity among certain states, on the other hand it has the disadvantage of creating a “hard core” within the Community⁶⁵. However, this phenomenon may be undertaken in the field of police and judicial cooperation in criminal matters, but shall be excluded in the field of external policy and common security, where the principle of “constructive abstention⁶⁶” shall be applied.

⁶³ Girolamo STROZZI, Roberto MASTROIANNI, *Diritto dell'Unione Europea*, cit., p. 17.

⁶⁴ This principle is regulated by Title VII.

⁶⁵ Girolamo STROZZI, Roberto MASTROIANNI, *Diritto dell'Unione Europea*, cit., p. 16.

⁶⁶ The constructive abstention does not prevent the adoption of the decision at issue, but it allows a Member State to avoid the decision on condition that it provides a formal reasoned declaration. In addition, the state

Therefore, the importance of the Amsterdam Treaty is based on the fact that, in addition to having incorporated the Schengen *acquis* into the European framework, it adopted a holistic approach, calling for a harmonization of the national asylum policies into a comprehensive system.

3.2 The Treaty of Lisbon.

Asylum definitely became a community issue with the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009. This Treaty introduced significant changes to the previous system, in particular modifying the Treaty on European Union and the Treaty establishing the European Community.

First of all, it eliminated the pillar structure, and the European Union replaced the European Community. The three pillars were united in the new Title V of the TFEU.

The Treaty of Lisbon is positively assessed since, with its approval, the process of European integration restarted, with a new positive attitude and great ambitions on the part of states after the failure of approval of the previous Treaty on a Constitution for Europe⁶⁷. Indeed, this Treaty included, although with some differences, the main innovations enshrined in the Constitutional Treaty.

The Treaty confirmed the aforementioned “flexible” integration process among Member States and also provided a more homogeneous discipline, no longer differentiated according to the different “pillars” in which the integration had to be achieved⁶⁸.

Furthermore, with this Treaty the European Parliament and Council became co-legislators placed on equal footing, and the office of the President of the European Council became stable. The continuity of the Union’s external action was strengthened through the appointment of the High Representative for Foreign Affairs and Security Policy. The rights of the European Parliament were specified and enhanced, as well as the rights of

shall recognize its obligation not to hinder the Union action based on this decision. At: Girolamo STROZZI, Roberto MASTROIANNI, *Diritto dell’Unione Europea*, cit., p. 42.

⁶⁷ The Treaty on a Constitution for Europe was signed on 29 October 2004 by representatives of 25 European States and ratified by 18 members. Nevertheless, the opposition of France and Holland did not allow its adoption.

⁶⁸ Girolamo STROZZI, Roberto MASTROIANNI, *Diritto dell’Unione Europea*, cit., p. 39.

the European citizens. Furthermore, the Treaty established the criteria for the accession of new states to the Union, as well as the criteria for the withdrawal of Member States. The current Title V of the TFEU regulates the three macro-areas concerning the management of borders, asylum and migration issues (the former Third Pillar). In particular, the issues are divided into five sections: borders control, asylum and migration, judicial cooperation in civil matters, judicial cooperation in criminal matters, and police cooperation.

On the first section, article 77 TFEU reasserts the elimination of checks at internal borders, as established by the Schengen Agreement, and conversely requires the need to strengthen controls at external borders. The norm highlights how, in order to ensure free and safe movements within the Union area, it is necessary to establish common access criteria for crossing the European borders, to be monitored through an integrated management system by Member States⁶⁹. The same article is the legal basis for a common policy on the issuance of visas and short-term residence permits, referring to the legislation of the Visa Code⁷⁰.

The common policy on asylum, with due regard to fundamental rights, is the objective of article 67 TFEU, developed on three regulatory levels: primary law, Regulations and Directives, and international agreements signed with third countries⁷¹.

Concerning a common migration policy, objectives are listed in article 79(1) TFEU and they focus on the effective management of migration flows, the fair treatment of third country nationals legally residing in a Member State, and the strong opposition to irregular migration. On these last issues, the more important instrument governing the management of migration flows among European Member States is the Dublin Convention.

⁶⁹ Giulia CILIBERTO, *Frontiere, asilo ed immigrazione nel Trattato di Lisbona*. At: Patrizia DE PASQUALE et al., *La politica dell'Unione in tema di immigrazione*, Napoli, The European Law Students' Association ELSA, 2018, p. 55.

⁷⁰ EU, *Visa Code*, Regulation (EC) No 810/2009, 13 July 2009. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0810&from=EN>

⁷¹ Giulia CILIBERTO, *Frontiere, asilo ed immigrazione nel Trattato di Lisbona*, p. 60.

3.3 The Dublin Convention.

Since most of the states bordering the Mediterranean are European Union Member States, it is important to describe how the European Union manages the flow of migrants once the shores of a Member State are reached.

With regard to the rules on the right of asylum, the European States refer to the Dublin Regulation, also known as the Dublin Convention (Dublin I). It has established a system of cooperation among states which has evolved against the background of a European area without internal frontiers developed thanks to the Schengen Agreement of 1985.

The Dublin Convention was drafted in Dublin on 15 June 1990 and entered into force on 1 September 1997 for twelve countries (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, the United Kingdom and Spain), then on 1 October 1997 for Austria and Sweden, and lastly on 1 January 1998 for Finland. The core principle of the Dublin Convention is defined in article 3(2) which states that only one state is responsible for examining the asylum application presented to the European Community according to the hierarchy of criteria set out from article 4 to 8. The first criterion refers to the state in which the applicant for asylum has a family member⁷² who is in turn identified as a refugee (article 4). By giving primary importance to this criterion and listing it first, the Convention met the UNHCR recommendations to promote family reunion⁷³. Secondly, the Member State which issued a valid residence permit or a visa is answerable (article 5). Thirdly, in case of illegal entry, the Member State whose borders the asylum seekers entered is responsible, unless it is proved that the applicant has been living for at least six months in another Member State where he or she first lodged the application (article 6). Fourthly, the Member State where the applicant entered legally and where the need for a visa is waived, is responsible (article 7). Lastly, when no Member State can be designated on the basis of the foregoing criteria, the first state in which the application is lodged shall be responsible (article 8).

⁷² “Family member” is defined in article 4 as “the spouse of the applicant for asylum or his or her unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant for asylum is himself or herself an unmarried child who is a minor of under eighteen years.”

⁷³ UNHCR EXCOM Conclusion No 9 (XXVIII) ‘*Family Reunion*’ (1977) and UNHCR EXCOM Conclusion No 24 (XXXII) ‘*Family Reunification*’ (1981). Available at: <http://www.unhcr.org/excom/exconc/3ae68c4324/family-reunion.html> and <http://www.unhcr.org/excom/exconc/3ae68c43a4/family-reunification.html> (Accessed: 23/10/2018)

Considering that, on the one hand, the Dublin Convention had the same field of application as the articles 28 ff. of the Schengen Agreement and that, on the other hand, not all the members of the former were members of the latter, a Protocol was signed in Bonn on 26 April 1995, according to which the relevant rules of the Schengen Agreement would be replaced by the rules of the Dublin Convention as soon as it entered into force⁷⁴. Obviously, all the other standards of the Schengen Agreement remained in force among the Parties States. As a consequence, the field of application *ratione personarum* of the rules regarding the elimination of checks on common borders and the crossing of external borders was separated from the field of application of the Dublin Regulation. Moreover, an innovation was introduced by article 18: A Committee was entrusted to examine, at the request of the states, any kind of issue regarding the application or the interpretation of the Convention and it was instructed to apply necessary measures like revisions or changes in order to respect article 8A of the European Economic Community.

The Dublin Convention improved the information exchange and communication among Member States; in this regard, article 15(12) allowed the countries to computerise all or part of the information, with due regard to personal data as established by the Strasbourg Convention of 28 January 1981 for the Protection of Individuals⁷⁵.

We can see that in the Dublin Convention the criteria for responsibility do not take into consideration several links between the asylum seekers and the country of asylum, such as cultural or linguistic connections, the presence of friends or other familiars who do not fall within the parameters established by article 4. Thus, almost no attention is paid to the applicants' interests and this can be a reason for negative repercussions on their integration process in the European countries.

The original Dublin Convention has undergone numerous reforms over the years: Dublin II (Regulation 343/2003), Dublin III (Regulation 604/2013) and Dublin IV, proposed by the European Commission in 2016 and still under discussion.

⁷⁴ The partial overlap of the rules, according to article 30 of the Vienna Convention on the Law of Treaties, could have created compatibility problems.

⁷⁵ Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*. Strasbourg, 28 January 1981. Available at: <https://rm.coe.int/1680078b37> (Accessed: 23/10/2018)

3.3.1 The Dublin II Regulation.

On 18 February 2003 the *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* was adopted. Known as Dublin II, it replaced the original Dublin Convention. As defined in article 29, this Regulation applies to requests to take charge of or take back asylum seekers made starting “from the first day of the six months following its entry into force⁷⁶”.

In 2006 Iceland and Norway joined the Dublin II Regulation signing a parallel agreement with the Council⁷⁷. In the same year, Denmark was added too⁷⁸, whereas it was initially not bound by the Regulation (as it is written in recital 18). Two years later, the Regulation provisions were extended to Switzerland and Liechtenstein, thanks to an agreement⁷⁹ and a protocol⁸⁰ signed by the aforementioned states with the European Community, which both entered into force in 2008.

⁷⁶ Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National* [2003], OJ L 50/1 (Dublin II Regulation), article 29. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R0343&from=en> (Accessed: 23/10/2018)

⁷⁷ *Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Iceland or Norway*. [2006] Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22006A0228\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22006A0228(01)&from=en) (Accessed: 23/10/2018)

⁷⁸ *Agreement between the European Community and the Kingdom of Denmark on the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in Denmark or Any Other Member State of the European Union and 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention* [2006] OJ L 66/38. Available at: <http://www.refworld.org/docid/4729a57f2.html> (Accessed: 23/10/2018)

⁷⁹ *Agreement between the European Community and the Swiss Confederation Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland*. [2008] OJ L 53. Available at: <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13261> (Accessed: 23/10/2018)

⁸⁰ *Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland* [2008] OJ L 161/8. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22011A0618\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22011A0618(03)&from=EN) (Accessed: 23/10/2018)

Dublin II, as the Dublin Convention, states that the responsibility for examining an asylum application lies with only one state, which is obliged to accept it. From article 7 to article 14 the criteria for assigning responsibility are defined, again in order of priority. They are the same as those enshrined in the Dublin Convention. Nevertheless, it is possible to underline the main differences between the two Regulations. Firstly, in Dublin II more attention is paid to the protection of unaccompanied minors (cf. article 6) and, in contrast with the Dublin Convention, in the absence of a family member, priority is given to the country of choice. Moreover, the family member now does not need to be a refugee, his application can even be under examination. The very concept of family member expanded: the unmarried partner with a stable relationship is now included in the definition in article 2(i). Finally, article 15 includes humanitarian clauses and allows states to deviate from the hierarchical criteria for humanitarian reasons.

In 2008 The Policy Plan on Asylum⁸¹ drafted by the Commission of the European Community addressed the main problems among the European countries involved in search and rescue operations and management of the asylum requests: a lack of common practice and of solidarity approach⁸². In 2009 this was confirmed by the Council of the European Union in the Stockholm Program which stated the need to improve mutual trust, fair sharing of responsibility and solidarity among states (in accordance with article 80 TFEU), and provided a framework for European Union action on the issues of immigration and security for the period 2010-2014. Furthermore, article 78 TFEU invites the Union to adopt legislative measures with the aim of developing a common policy on asylum and protection, also including the need to offer an appropriate status to any third-country national. The adoption of these measures opened a second phase of a Common European Asylum System by the end of 2012⁸³.

⁸¹ Commission of the European Communities, *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*. (COM (2008) 360 final). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0360&from=EN> (Accessed: 21/10/2018)

⁸² Agnès HURWITZ, *The Collective Responsibility of States to Protect Refugees*, p. 125.

⁸³ Steve PEERS, *The Common European Asylum System: State-of-play update*, 2012. Available at: <http://www.statewatch.org/analyses/no-206-asylum-procedures.pdf> (Accessed: 08/10/2018)

3.3.2 The Dublin III Regulation.

On 26 June 2013, after a long period of negotiations started in 2008, the Council and the European Parliament adopted the *Regulation (EU) No 604/2013 of the European Parliament and the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)*, or Dublin III Regulation. It applied to the 28 EU Member States, Switzerland, Lichtenstein, Norway, and Iceland, and it referred to any application to take charge of or to take back applicants from January 2014. Again, the main principle is that asylum requests have to be examined by one single state and this competency is attributed to the state which played the greatest part in the phase of the arrival of the individual in the European Union area. The hierarchy of criteria are set out in Chapter III and, as in the previous Regulation, great attention is paid to the protection of unaccompanied minors (article 6 guarantees their rights) and family union (from article 8 to article 11). The Dublin III Regulation introduced new provisions in order to improve the level of protection for applicants. For instance, one of the core changes is included in article 3(1), which claims the responsibility to examine any application for international protection also from a stateless person. Article 4 introduces the right to information of the applicant about the Regulation principles and article 5 requires a personal interview with the applicant before any decision is taken to transfer him or her to another state. Moreover, article 18 now lays down the obligations of the Member State responsible. Article 33 introduces a “mechanism for early warning, preparedness and crisis management”. The humanitarian clause becomes more relevant (article 17(2)) since it can be used whenever families would be separated by applying the Regulation, and “family member” is replaced by “any family relations”. Article 27 grants the applicant the right to an effective remedy against a transfer decision, before a court or a tribunal, while article 28 provides rules regarding detention.

Despite the numerous changes provided to the Dublin system over the years, it is not possible to ignore the many reports⁸⁴ of the United Nations High Commissioner for

⁸⁴ See e.g.: ECRE, *Report on the Application of the Dublin II Regulation in Europe*. (ECRE & ELENA 2006) Available at: <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Report-on-the->

Refugees and of the European Council on Refugee and Exile, which revealed the presence of still serious flaws in the system and still grave problems in the organization and management of the migration issue among the European countries.

3.3.3 The Dublin IV Proposal.

On 4 May 2016, the European Commission presented a package of legislative proposals to reform the Common European Asylum System, in which the Dublin IV Regulation constituted the central feature. In the Communication of 6 April 2016, the Commission declared:

“There are significant structural weaknesses and shortcomings in the design and implementation of European asylum and migration policy, which the crisis has exposed. (...) The Dublin system was not designed to ensure a sustainable sharing of responsibility for asylum applicants across the EU, a shortcoming that has been highlighted by the current crisis.⁸⁵”

The high concentration and volume of arrivals in the last few years have exposed the weakness of the Dublin system and the need to revise and replace its instruments in order to improve the management of migration flows.

In its reform proposal, the aim of the European Commission was to make the Dublin system more transparent and efficient and at the same time provide an effective mechanism to deal with the disproportionate pressure on individual States' asylum systems. Thus, the proposal was about enhancing the system's capacity to define a single state responsible for examining the application of international protection, ensuring fair

[Application-of-the-Dublin-II-Regulation-in-Europe- March-2006.pdf](#); UNHCR, *The Dublin II Regulation*. A UNHCR Discussion Paper. (2006) Available at: <http://www.refworld.org/docid/4445fe344.html>; ECRE, *Comments on the Dublin III Regulation*. (March 2015) Available at: <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Dublin-III-Regulation March-2015.pdf> (Accessed: 21/10/2018)

⁸⁵ European Commission, *Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final, 6 April 2016. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0197&from=en> (Accessed: 09/10/2018)

sharing of responsibility among the states thanks to a corrective allocation mechanism (called *fairness mechanism*) in the cases of disproportionate pressure, discouraging abuses, preventing secondary movements, considering and protecting asylum seekers' interests. This new Regulation would introduce many important amendments, among which the core change would be the possibility to establish when a country is facing a disproportionate amount of asylum applications, considering its size and wealth. When the applications received by a state exceed 150% of its reference numbers, all further applications would be relocated to another Member State. However, the latter would have the possibility to not take part in the reallocation but it would have to contribute by giving to the Member State to which it has refused the reallocation an amount of €250,000 for each applicant whom it would be responsible for under the mechanism of solidarity.

Furthermore, another relevant change would concern the family concept, that would include the siblings of applicants and family relations formed after leaving the country of origin and before the arrival to the Member State. Finally, the personal scope of the Regulation would be extended to beneficiaries of international protection (refugee status or subsidiary protection) who are in a Member State different from the one which granted them protection. According to the proposal, in this case the state that recognized international protection must take the beneficiary back, whether he or she has submitted a new application of asylum or is residing irregularly in another state.

On 5 June 2018 the Home Affairs Ministers of the EU met to discuss the Dublin IV proposal and the reform of the Common European Asylum System. The discussion did not result in any effective decision. The states which had declared their opposition to the proposal were Italy, Spain, the Visegrad group (Poland, Hungary, Czech Republic and Slovakia), Austria, Romania, and Slovenia. The United Kingdom, Poland, and Estonia remained neutral, whereas Greece, Malta, and Cyprus declared themselves open to negotiate.

On 28 and 29 June 2018 the European Council meetings discussed security and defence, economic and financial affairs, but also paid particular attention to the subject of immigration and admitted that

“further work was needed on the Dublin Regulation to find a consensus based on a balance of responsibility and solidarity. Missing its self-imposed June

2018 deadline, it invited the Council to conclude its work as soon as possible so as ‘to find a speedy solution to the whole package’⁸⁶.

At present, no progress has been made.

3.4 The externalization of migration policies in bilateral agreements.

In dealing with the complex issue of migration flows, there have been some cases in which the European Union adopted the strategy of externalization of migration policies. This means that, instead of managing the issue within the borders of the Union and dividing responsibilities among Member States, it preferred adopting a system which unloads responsibilities to third countries. In order to implement this strategy, in several cases the Union as a whole, or some of its Member States alone, decided to draft agreements with third countries. As clear examples of this approach, it is worth analysing two important documents recently drafted: the EU-Turkey Statement and the Memorandum of Understanding between Italy and Libya. In this first chapter, they will be analysed as examples of the procedure of externalization of borders. In the third chapter, they will be taken into consideration again, but under the point of view of migrants’ human rights, since some violations of them are included in their provisions. Therefore, concerning this externalization procedure, a double bifurcation seems to emerge: a bifurcation of law and a bifurcation of human rights standards⁸⁷. This means that laws and human rights seem to be ensured only within European borders and not outside.

⁸⁶ European Parliament, *Post-European Council Briefing: Outcome of the meetings of EU leaders on 28-29 June 2018*. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621838/EPRS_BRI\(2018\)621838_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621838/EPRS_BRI(2018)621838_EN.pdf) (Accessed: 09/10/2018)

⁸⁷ Thomas SPIJKERBOER, *Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice*, *Journal of Refugee Studies* 31, 2017, pp. 216-239.

3.4.1 The EU-Turkey Statement.

The EU-Turkey Statement was signed on 18 March 2016 and entered into force on 20 March 2016. It was created with the purpose of hindering the massive migration flows that headed from Turkey to Europe, and to Greece in particular. According to this document, all migrants who do not apply for asylum with the Greek authorities, or whose applications are rejected, shall be turned back to Turkey⁸⁸. In exchange, the EU has promised to increase resettlement of Syrian refugees, improve visa liberalisation for Turkish citizens, and boost financial support for the refugees in that country. Indeed, the EU granted Turkey €6 billion (€3 billion for 2016-2017 and €3 billion for 2018-2019) for the Facility for Refugees in Turkey, in order to assist the state in addressing the needs of refugees⁸⁹.

According to statistics, in a year the main goal was reached: arrivals to Europe from 2016 to 2017 registered a significant decline⁹⁰.

This Statement appears as an example of externalization of migration policies: the European Union shifts to Turkey the responsibility of managing the migration flows, so the European countries do not have to deal with them.

A major debate revolves around the question if the deal could be considered as an instrument of soft law or as an international treaty, and around its relation with European constitutional law. On the one hand, it could not appear as an international treaty, first of all because it is called “Statement” and secondly because of its wording: it prefers “will” instead of “shall”, and this could be proof of a non-binding nature. Moreover, it was concluded through an informal procedure, suitable for an instrument of soft law.

On the other hand, under international law, an international treaty is defined as an agreement concluded in written form between states or international organizations, regardless of its designation⁹¹. This could be sufficient in order to define it as a treaty. In

⁸⁸ European Council, *EU-Turkey Statement*, 18 March 2016. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (Accessed: 15/10/2018)

⁸⁹ European Commission, *The EU Facilities for Refugees in Turkey*. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf (Accessed: 26/10/2018)

⁹⁰ See Table 1.

⁹¹ UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, article 2(1). Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>; UN, *Vienna Convention on the Law of Treaties between States and International Organizations or between*

addition, the deal establishes specific commitments for the parties, thus creating rights and duties defined in specific “action points”. Thus, the most common definition of the deal is an international treaty with binding provisions having an atypical form. Against this position, it would be possible to sustain that the statement could reiterate the duties included in already existing documents: The Agreement on readmission between EU and Turkey⁹² and the Greece-Turkey bilateral readmission agreement⁹³. Nevertheless, the EU-Turkey deal not only reiterates, but also adds some commitments.

Therefore, the most reliable explanation about its unclear structure may have a political nature: members of the European Parliament may have chosen to adopt a statement in order not to involve national parliaments, since this procedure would have required very long timetables, incompatible with the pressing requirements imposed by the migration crisis. In this case, some violations of international law occurred. Firstly, the document was drawn up without complying with the provisions of the Treaty on the Functioning of the European Union (TFEU)⁹⁴. In particular, in violation of article 218(2) no authorisation to open negotiations nor to conclude the agreement had been requested of the Council; the text was not submitted to the European Parliament and the Council as required by articles 294(2) and 218(6); the European Court of Justice had not been consulted regarding the compatibility of the deal with European law (article 218(11)). These violations, added to the human rights violations which will be analysed later, create a very widespread disapproval of the deal.

3.4.2 The Memorandum of Understanding between Italy and Libya.

On 2 February 2017 in Rome, the Italian Prime Minister and the Head of the UN backed-Libyan Government signed the Memorandum of Understanding on cooperation in the

International Organizations, 21 March 1986, article 2(1). Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf (Accessed: 01/12/2018)

⁹² EU, *Agreement Between the European Union and The Republic of Turkey on The Readmission of Persons Residing Without Authorisation*, 16 December 2013. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0507\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22014A0507(01)&from=EN) (Accessed: 01/12/2018)

⁹³ In June 2018 the Greece-Turkey bilateral agreement was suspended.

⁹⁴ *Consolidated Version of the Treaty on the Functioning of the European Union* (Treaty of Rome), 26 October 2012. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN>

fields of development, the fight against illegal immigration, human trafficking and fuel smuggling, and on reinforcing of security borders⁹⁵.

It was not the first example of cooperation between Italy and Libya: numerous agreements were concluded during Ghedaffi's regime in order to contain migration flows and enhance readmissions. This cooperation on the issue was only suspended in 2012, after the regime collapse, the outbreak of the civil war, and the *Hirsi Jamaa and Others v. Italy* case, which involved the two countries and ended with the condemnation of Italy by the European Court of Human Rights.

Hence, the Memorandum represents a new chapter of joint efforts between the two countries with the purpose of increasing border control and fighting irregular migration and terrorism, as declared in the Preamble of the document. Subsequently, the first two articles enlist the obligations of the parties, followed by article 3 which establishes a mixed Committee in charge of implementing and monitoring the Memorandum commitments. Finally, from article 4 to 8, financing, legal framework and technical aspects are analysed. Nevertheless, the language used in the agreement is sometimes generic and not always clear, so the project turns out not to be perfectly understandable. In particular articles 1 and 2 hold the most controversial aspects of the Memorandum. First of all, article 1(1) reiterates that the two parties pledge to cooperate on the abovementioned issues in conformity with the activities of the Libyan Government of National Accord and Presidential Council, supporting military institutions in accord with the Treaty of Friendship, Partnership and Cooperation⁹⁶. Then, points 2 and 3 of article 1 declare Italy's engagement in order to offer sustenance and finance development programs to the regions particularly affected by illegal immigration, providing also technological aid to the Libyan Coast Guard, Border Guard, Ministry of Defence and of Home Affairs.

⁹⁵ *Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic*, 2 February 2017. Available at: http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf (Accessed: 24/11/2018)

⁹⁶ *Treaty of Friendship, Partnership, and Cooperation between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Italy*, 30 August 2008. Available at: https://security-legislation.ly/sites/default/files/lois/7-Law%20No.%20%282%29%20of%202009_EN.pdf (Accessed: 25/11/2018)

Article 2 further details some of these mentioned provisions and declares the parties' commitments, which aim at: the finalisation of Southern Libya's border control; the financing and the adjustments of reception centres, where Italy should contribute to supplying medicines and medical assistance; the training of Libyan personnel present in the centres; the support to international organizations present in Libya with the purpose of returning migrants to their country of origin; the investment in development programs, particularly for job creation.

Therefore, the main activities supported by the Memorandum turn out to have the objective of reducing entries to Italy, enhancing Libyan border control and preventing departures. According to its wording, the deal makes sure that migrants are intercepted and blocked by the Libyan Coast Guard which pushes them back to Libyan Southern borders and to reception centres. This seems to be an attempt to shift the burden of migration control from Italy to another country. Again, as the previous EU-Turkey statement, it is possible to talk about externalization of migration policies.

CHAPTER II

THE SEARCH AND RESCUE OPERATIONS IN THE MEDITERRANEAN AND THE INTERVENTION OF NGOs.

1. The search and rescue operations and the issue of the smuggling of migrants in the Mediterranean.

The term “search and rescue”, which is often shortened with the acronym SAR, identifies those operations which are conducted by personnel trained for this purpose using specific means by sea, air or land, in order to provide aid to people in distress or imminent danger. There are different types of search and rescue. For instance, ground SAR refers to the search for people who are in distress or lost on land. SAR operations are often necessary in mountainous areas, where cave rescues are undertaken for rescuing lost or trapped explorers. Moreover, urban search and rescue is the intervention to save victims of collapsed buildings or other entrapment situations in town. Instead, combat SAR refers to those operations carried out during war for searching and helping civilians near combat zones. Finally, maritime search and rescue are those activities undertaken by sea to help sailors, ship passengers or migrants in distress. People who undertake these activities varies by countries and may be members of the Coast Guard, the Navy, specific Agencies or voluntary organizations, as NGOs. When one of them identifies a vessel in distress, it deploys lifeboats to take passengers on land. Sometimes, an air-sea rescue may be organised and, in this case, aircrafts and helicopters help lifeboats with the coordination of the operations.

The issue of maritime SAR in the Mediterranean Sea is strictly connected with the issue of migrant smuggling. In the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, migrant smuggling is defined as

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident⁹⁷”.

It differs from the concept of “human trafficking” since in the latter an element of exploitation is required, it refers to a movement of people also within a single country, and it is considered to be a crime against an individual. Instead, “smuggling” is consensual, transnational and it is considered a crime against a state. However, smuggling can lead to trafficking, so it can sometimes be difficult to discern one from the other.

Due to its clandestine nature, it is not easy to conduct reliable statistical reports about the number of migrants smuggled every year. Nevertheless, the International Organization for Migration, can give us an overview of the phenomenon in Southern Europe. According to the IOM’s Data and Research, in this part of the world the main migrant-smuggling method is maritime smuggling towards Italy, Spain, Portugal, Greece and Malta, and from 2015 to 2017 the number of irregular border crossings has reduced by 60%. The central Mediterranean route is considered the most dangerous in the world, with 60% of deaths in 2017⁹⁸.

2. The main European Agencies involved in the fight against the smuggling of migrants.

Since 2016, European authorities can count on the support of the European Migrant Smuggling Centre (EMSC), which helps to coordinate anti-smuggling actions. Fighting smuggling migration is a key priority of the European Agenda on Migration set for the period 2015-2020, which includes a common Action Plan against Migrant Smuggling⁹⁹.

⁹⁷ UN, *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000, article 3(a). Available at: https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf (Accessed: 21/10/2018)

⁹⁸ IOM, *Migrant Smuggling Data and Research: A global review of the emerging evidence base*, Volume 2, p. 111. Available at: https://publications.iom.int/system/files/pdf/migrant_smuggling_data_vol2_0.pdf (Accessed: 11/10/2018)

⁹⁹ European Commission, *Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions. EU Action*

It is based on the active cooperation of Europol, the military operation European Union Naval Force Mediterranean, and Frontex.

Moreover, CEPOL, Eurojust, the Fundamental Rights Agency, the European Asylum Support Office, and the European Maritime Safety Agency provide their support and contribution to European Agencies' actions against migrant smuggling. In addition, the EU proposes a system of direct aids for third countries, such as Ethiopia and Nigeria, providing financial assistance, prevention and information campaigns in order to fight migrant smuggling at the origin¹⁰⁰.

2.1 Europol.

Europol is the European Union's law enforcement agency and is based in The Hague. It cooperates with EU Member States but also with non-European partner states and international organisations, with the aim of fighting all kind of criminal activities.

It collects all information for cases of migrant smuggling by sea and from 2015 it elaborates in-depth analyses through a broad range of sources, such as social media analyses, reports coming directly from the states' law enforcement agencies or from partner agencies (European Asylum Support Office or UN agencies) and National Central Bureaus. According to its last Activity Report that is focused on the period January 2017-January 2018¹⁰¹, on the Central Mediterranean route the majority of irregular migrants who arrived to Europe left primarily from Libya and Tunisia. For the West Mediterranean route, the main departure points are Morocco, Algeria and Ivory Coast; the number of

Plan Against Migrant Smuggling (2015 - 2020) COM (2015) 285 final. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf (Accessed: 12/10/2018)

¹⁰⁰ European Commission, *Report from The Commission to The European Parliament, The European Council and The Council, Fifth Progress Report on The Partnership Framework with Third Countries Under the European Agenda on Migration*, COM (2017) 471 final. Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/31673/fifth-progress-report-partnership-framework-third-countries-under-european-agenda-migration_en (Accessed: 29/10/2018)

¹⁰¹ Europol, *Two years of EMSC: Activity report Jan 2017- Jan 2018*. Available at: file:///C:/Users/annas/Downloads/two_years_of_emsc_report.pdf (Accessed: 24/10/2018)

migrants arriving from these countries in 2017 more than doubled and this upward trend is still continuing.

The methods for clandestine entry used by smugglers of migrants both by land and sea are often life-threatening. Among the most frequent, Europol reports ever more cases of migrants being hidden in tight spaces behind engines in lorries, cargo trains or vans. Smugglers often use fake license plates on cars in order to evade the video surveillance of highways. In other cases, they instruct migrants to pretend to be bus or truck drivers and provide them with fake documents. Moreover, migrants are smuggled by small boats on which 50-60 migrants can be carried on average, with a cost ranging from €2,500 to €6,000.

2.2 EUNavFor Med.

The military operation European Union Naval Force Mediterranean was set up by the European Council in 2015. It is known with the acronym EUNavFor Med or Operation Sophia, from the name of a baby born just after her mother was rescued and disembarked in the harbour of Taranto, together with other 453 migrants, on 24 August 2015. Its core mission mandate is to identify and dismantle ships and equipment used, or suspected of being used, by migrants' smugglers in the Central and Southern Mediterranean. From 2016, the operation carries out two supporting tasks: training the Libyan Coast Guard and Navy and contributing to the respect of UN arms embargo on the high seas off Libya's coasts in accordance with UN Resolution 2420 (2018)¹⁰² adopted by the Security Council, which extended the authorizations set out in Resolution 2357 (2017)¹⁰³ and Resolution 2292 (2016)¹⁰⁴. The operation is based in Rome and its commander is the Italian rear admiral Enrico Credendino. On 14 May 2018, the Council allowed the creation of a Crime Information Cell (CIC), a project with the aim of enhancing the exchange of information

¹⁰² UN, *Resolution 2420 (2018)* Adopted by the Security Council at its 8282nd meeting, on 11 June 2018. Available at: [http://undocs.org/S/RES/2420\(2018\)](http://undocs.org/S/RES/2420(2018)) (Accessed: 12/10/2018)

¹⁰³ UN, *Resolution 2357 (2017)* Adopted by the Security Council at its 7964th meeting, on 12 June 2017. Available at: [http://undocs.org/S/RES/2357\(2017\)](http://undocs.org/S/RES/2357(2017)) (Accessed: 12/10/2018)

¹⁰⁴ UN, *Resolution 2292 (2016)* Adopted by the Security Council at its 7715th meeting, on 14 June 2016. Available at: [http://undocs.org/S/RES/2292\(2016\)](http://undocs.org/S/RES/2292(2016)) (Accessed: 12/10/2018)

about criminal activities and providing a useful platform available to all agencies which fight human trafficking and smuggling in the Mediterranean. This can help strengthen collective effectiveness and operational impact. On 5 July 2018 a CIC was activated for the first time on board the Flagship of EUNavFor Med, Italian Navy Ship San Giusto, moored in Augusta.

2.3 Frontex.

Frontex was set up with Council Regulation (EC) 2007/2004 of 26 October 2004, as the “European Agency for the Management of Cooperation at the External Borders of the Member States of the European Union”, but in 2016 with the Regulation (EU) 2016/1624 it has been renamed as the “European Border and Coast Guard Agency”. Based in Warsaw, its main task concerns the coordination of cooperation among states with the aim of ensuring security and well-functioning management of external borders. Furthermore, Frontex is responsible for the elaboration of risk analyses on migrant smuggling routes, and it supports Member States in organizing joint return operations. It helps border authorities in sharing information with the other Member States and evaluates migratory pressure on each state, its readiness to face the migration flows, besides providing support for the search and rescue operations for persons in distress at sea with its pool of about 1500 border guards, ready to intervene. The Agency supports states also in the identification of migrants, gathering screenings, debriefings and fingerprints¹⁰⁵. It provides the main publication in which data can be obtained: The Annual Risk Analysis. In particular, Frontex is committed to preventing smuggling, terrorism and human trafficking and collecting data on illegal entries into the EU’s external borders. In 2015 and 2016 it detected more than 2,3 million illegal crossings, while in 2017 the total amount fell to 204,700¹⁰⁶.

¹⁰⁵ Frontex, *Origin & Tasks*. Available at: <https://frontex.europa.eu/about-frontex/origin-tasks/> (Accessed: 27/10/2018)

¹⁰⁶ European Parliament, *EU migrant crisis: facts and figures*, 30 June 2017. Available at: <http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures> (Accessed: 27/10/2018)

2.4 Frontex' Operations.

From November 2014, Frontex conducted a border security operation called the Triton Operation, which replaced the previous Italian Operation Mare Nostrum, and involved voluntary contributions from 15 countries, both EU Members and non-Members.

In this operation, all the vessels involved operated under the orders of Rome and were authorized by Italy to land on its territory.

More recently, from 1 February 2018 Frontex has launched a new operation in central Mediterranean: The Operation Themis¹⁰⁷, which has continued to include search and rescue operations as a priority. Moreover, it has focused on improving support to law enforcement with the aim of countering organised crime such as human and drug smuggling, and it has collected intelligence in order to stop foreign fighters and terrorists from entering European countries. The new mission covers a larger area than any other previous Frontex operation, extending from the shores of Turkey to Morocco, Tunisia, Egypt, Algeria and Albania, thus covering the Adriatic Sea as well. The limit of the patrolling line from Italian coasts has been reduced compared to the previous line set under the Triton Operation: Themis stops at 24 miles, whereas Triton reached the 30 nautical miles from Italy's shores.

Therefore, Themis respects the limits of the contiguous zone, as established by article 33 of the abovementioned UNCLOS¹⁰⁸, exceeded by the Triton Operation because of the particularly critical conditions of migration crisis in 2014. The main change introduced by this operation is that Italy, contrary to what was established by the Triton Operation, is no longer required to receive all migrants rescued, but they have to be delivered to the nearest port, thus respecting the SAR Regions of responsibility and observing the law of rescue at sea established by the 1979 International Convention on Maritime Search and Rescue, so far misapplied. This decision has not been well received by Malta and Tunisia, which have often been reluctant to disembark migrants on their shores so far.

¹⁰⁷ Frontex, *Frontex launching new operation in Central Med*, 1 February 2018. Available at: <https://frontex.europa.eu/media-centre/news-release/frontex-launching-new-operation-in-central-med-yKqSc7> (Accessed: 29/10/2018)

¹⁰⁸ Unlike territorial waters, the contiguous zone is optional and must therefore be declared by the coastal state to come into existence. Italy has not yet formally declared a contiguous zone in accordance with the Montego Bay Convention, but has referred to it in the law n. 189 (article 11(d)) of July 2002 (the so called Bossi-Fini law); however, this mention refers only to immigration issue, not providing for the use of the contiguous zone for other instances.

Frontex, like all the other European Agencies, is committed to ensuring that the main objective for every state is the safety of people in distress at sea, not the rebound of responsibilities or their removal from European borders. However, since unfortunately not all states are committed in this sense, the role played by Non-Governmental Organizations becomes of fundamental importance.

3. The intervention of NGOs: definition, characteristics and international legal status.

A Non-Governmental Organization (NGO) is a non-profit association of private individuals who share a common interest and objective, organized on a local, national or international level. NGOs carry out several services and functions around specific issues, such as safeguarding human rights, environment and public health, providing analyses, and helping to implement international agreements through the interaction with states and international organisations. In addition, in order to be defined as an NGO, it must be non-violent.

The term “Non-Governmental” was first coined in 1945 when the United Nations named this kind of association in Chapter 10 of their Charter, in order to differentiate between rights for intergovernmental specialized agencies and rights for international private organizations¹⁰⁹, independent from governments’ control. The official and complete definition is provided by Resolution 288(X) of the Economic and Social Council, adopted on 27 February 1950. Nevertheless, NGOs had existed for many years before. In 1910, 132 international non-profit organizations met in Brussels and decided to collaborate, they operated under the name “The Union of International Associations”¹¹⁰. Currently, many NGOs are also called Private Voluntary Organizations (PVO).

According to the World Bank, NGOs can be divided into two main categories: Operational NGOs, which undertake to create specific development-related projects, and

¹⁰⁹ UN, *The UN Charter*, 26 June 1945. Articles 70 and 71. Available at: <http://www.un.org/en/sections/un-charter/un-charter-full-text/> (Accessed: 31/10/2018)

¹¹⁰ Peter WILLETTS, *What is a Non-Governmental Organization?* London, 2002. Available at: <http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM> (Accessed: 15/11/2018)

Advocacy NGOs, which operate to promote and support particular causes¹¹¹. Nevertheless, a number of NGOs might fall into both categories, by handling both activities.

Despite their growing prominence and presence on an international level, these organizations have no clear international legal status. In order to exist, each NGO must be created according to the legislation of a specific state, therefore, as for any other private entity whose legal status is defined under domestic law, its recognition only applies to that single state, and not to the other states of the international community.

International law gives NGOs quite a marginal role, in particular an exclusive consultative status. So far, no convention or multilateral treaty about NGOs' legal status has been widely ratified, nor is there any International Court of Justice decision or UN General Assembly resolution about states' consensus on the legal personality of NGOs. Currently, in Europe, only twelve states have ratified the European Convention on the Recognition of the Legal Personality of International Organization, drafted in Strasbourg in 1986¹¹².

The only exception among NGOs is the International Committee of Red Cross (ICRC), a Swiss humanitarian organization with a particular legal status as well as specific immunities and privileges. These are granted by states in order to allow the organization to carry out its task, which consists of assisting and protecting victims of armed conflicts, as a completely neutral entity. Set up as a private association, its mandate is enshrined in the 1949 Geneva Conventions and their Protocols, which thus confer the ICRC an international legal status equivalent to that of an international organization. Therefore, the ICRC is the only NGO which owns an international status both "private" (regulated by Swiss domestic law) and "public" (regulated by international law)¹¹³.

¹¹¹ Operations Policy Department, World Bank, *Working with NGOs: A Practical Guide to Operational Collaboration between The World Bank and Non-governmental Organizations*, March 1995, p. 14. Available at: <http://documents.worldbank.org/curated/en/814581468739240860/pdf/multi-page.pdf> (Accessed: 01/11/2018)

¹¹² Council of Europe, *European Convention on the Recognition of the Legal Personality of International Organization*, 24 April 1986. Available at: <https://rm.coe.int/168007a67c> (Accessed: 31/10/2018). It has been signed and ratified by Austria, Belgium, Cyprus, France, Greece, Liechtenstein, the Netherlands, Portugal, Slovenia, Switzerland, the Republic of Macedonia and the United Kingdom. Status as of 31 October 2018.

¹¹³ Dominique CARREAU, Fabrizio MARRELLA, *Diritto internazionale*. Milano, Giuffrè Editore, 2016, p. 459.

Despite the uncertain status of the other NGOs, they do have an increasing impact on the international legal system, in particular on the decision-making process by supporting new policies and changes in international regimes, besides participating as *amici curiae* in some international judicial proceedings. They monitor states' compliance with international rules and often influence the agenda of states and international organizations, intervening in discussions and negotiations.

Currently, the number of NGOs worldwide has considerably increased and is now around 10 million¹¹⁴. Several factors have contributed to this spread of NGOs: first of all, the growing relevance of transnational issues due to globalization, then the increase of UN global conferences which include NGOs forums, the communications revolution which has helped people to connect and aggregate, and the spread of democracy which has allowed individuals to form organizations more freely.

As non-profit organizations, NGOs rely on different subsidies for sustaining their costs, salaries and projects: the main sources of funding include membership dues, funds from philanthropic associations, grants from local or state agencies, and mostly private donations. Moreover, despite their non-governmental nature, even government funding is sometimes a prominent source. However, it is important to underline that government funding does not necessarily lead to government control. There are some NGOs operating in a humanitarian and development framework, which need substantial resources in order to run their projects, so most of them accept even official funds. On the other hand, other NGOs (like Amnesty International or Greenpeace) clearly refuse any government funding for their activities.

3.1 Different types of NGOs.

¹¹⁴ Non-profit Action, *Facts and Stats about NGOs Worldwide*, 4 September 2015. Available at: <http://nonprofitaction.org/2015/09/facts-and-stats-about-ngos-worldwide/> (Accessed: 01/11/2018)

As previously said, the non-profit associations can be divided into Operational and Advocacy NGOs. In addition, different types of NGOs can be identified and classified according to two more elements: their orientation and their level of operation.

The orientation defines the beneficiaries of the mission that the NGO aims to achieve and provides for an increasing participation of the recipients in order to achieve the service. Firstly, it is possible to identify those organizations with a charitable orientation, which are committed to meeting the needs of the poor, such as food distribution, provisions of shelters, clothes or medical assistance. These NGOs also intervene in the cases of humanitarian emergency, for example after earthquakes, floods, and man-made or natural disasters. In their projects there is very little participation of the beneficiaries in designing the programs. NGOs belonging to this category are, for instance, Caritas and INTERSOS. Furthermore, there are NGOs with service orientation, that provide education services, health support, family aid, in which people are expected to both receive and implement the service.

Moreover, some NGOs have a participatory orientation, characterized by self-help plans in which local people directly intervene with cash, labour or materials in order to implement the project.

Finally, other NGOs have an empowering orientation and aim at helping poor people develop an understanding of social, political and economic factors, trying to encourage awareness of their abilities to take control of their lives and improve their situation. This last case is characterized by the greatest involvement of people in the NGO project.

Regarding the level of operations, NGOs can be distinguished in different levels, from the local to the international. Firstly, there are community-based organizations, which are local associations and clubs focused around a certain area of interest, for instance sport, women's rights, educational or religious organizations. Some of them are independent, others can be supported by other national or international non-profit organizations.

Then, citywide organizations are interested in helping people in need at the city level and include organizations like the Rotary Club and the Lions Club, ethnic or educational groups.

Furthermore, some NGOs have a national operation, exist and work in a single country only. However, because of the globalization process this type of NGO is quite rare nowadays.

Lastly, there are the international non-profit organizations, whose activities can be carried out anywhere in the world, and vary from funding new missions to implementing already existing projects.

4. The main NGOs which have operated in the Mediterranean area from 2014 to 2018.

In the Mediterranean Sea, not only states and European Agencies are facing the migrant crisis, but also NGO vessels contribute and play a crucial role in search and rescue operations. When in 2014 the Triton Operation replaced the previous Italian Mare Nostrum Operation, various NGOs entered into action in order to deal with the growing number of deaths at sea. It is obvious that the way states have dealt with the current migration crisis in some cases has led to shortcomings with regard to rescue efforts, therefore the NGOs have been fundamental in filling the lack of intervention. Hence, a brief examination of the main non-profit organizations involved is necessary.

4.1 Migrants Offshore Aid Station (MOAS).

The first NGO to operate in the Mediterranean area was the Migrants Offshore Aid Station (MOAS), based in Malta and established in 2014 by Christopher and Regina Catrambone together with search and rescue professionals, in response to the humanitarian disaster that occurred in 2013 near the coast of Lampedusa. It provides medical support, humanitarian aid and endorses different operations for migrants in distress. Regarding the Mediterranean area, this Non-Governmental Organization has undertaken four operations up to now. Firstly, it acted in 2014 and 2015 with its SAR vessel named the Phoenix, which rescued about 11,685 people. Subsequently, between June and December 2016, it intervened again in the Central Mediterranean with two vessels, the Phoenix and the Responder, assisting more than 20,000 migrants¹¹⁵. Finally,

¹¹⁵ Data provided by MOAS website. Available at: <https://www.moas.eu/> (Accessed: 01/11/2018)

in April 2017 its last mission was launched and 7,826 people were saved from the Mediterranean waters.

Currently, since the emergency has diminished, the MOAS has decided to focus on the distribution of medical aid and assistance to Rohingya migrants in Bangladesh, but it is maintaining situation awareness in the Mediterranean and is ready to intervene, whenever the need arises.

4.2 SOS Méditerranée.

SOS Méditerranée is a Franco-German private project founded in 2015 in Germany by Klaus Vogel and Sophie Beau, particularly supported by France and Italy, with four headquarters located in Berlin, Marseilles, Palermo and Geneva. Its main objective is conducting search and rescue operations in the Central Mediterranean, but it is also involved in collecting eyewitness accounts, informing migrants both in their country of origin and in transit about access conditions to Europe and about the dangers which they are exposed to, informing the European public opinion, and cooperating with European institutions. It is exclusively composed of and financed by private citizens. From 2016, SOS Méditerranée has operated in coordination with the Italian MRCC with its vessel, the Aquarius, in the sea area around Sicily, Lampedusa and Libya. Up to now, this vessel has helped around 27,746 persons in distress at sea¹¹⁶.

4.3 Médecins Sans Frontières.

Médecins Sans Frontières (Doctors Without Borders) is a Non-Governmental Organization which operates in more than 70 countries around the world and provides medical assistance to people involved in conflicts, wars, epidemics or to whoever is in serious need of healthcare. It was founded in 1971 in Paris by a group of 13 doctors and

¹¹⁶ Data provided by SOS Méditerranée website. Available at: <https://sosmediterranee.org/> (Accessed: 02/11/2018)

journalists, in response to the war which had broken out in Biafra, Nigeria, and the serious humanitarian crisis that followed.

The first team created counted 300 volunteers, whereas currently this NGO includes in its staff more than 42,000 people coming from over 150 different countries. In 1999 this humanitarian organization was awarded with the Nobel Peace Prize.

Its members started to intervene in the Mediterranean area in 2015, after the Italian Mare Nostrum Operation ended, and up to the present time they have assisted around 77,579 people. They operate with their own vessels, named Prudence, Argos and Dignity I, but they also join forces with other NGOs. For instance, up to August 2018 they were on board the Aquarius with SOS Méditerranée, in order to provide immediate medical care and psychological support to the people rescued. When necessary, they organized medical evacuation by helicopter or motorboat in coordination with the MRCC.

The following Figure 4 illustrates the number of people assisted by Médecins Sans Frontières during the total 645 search and rescue operations performed from 2015 up to 10 August 2018.

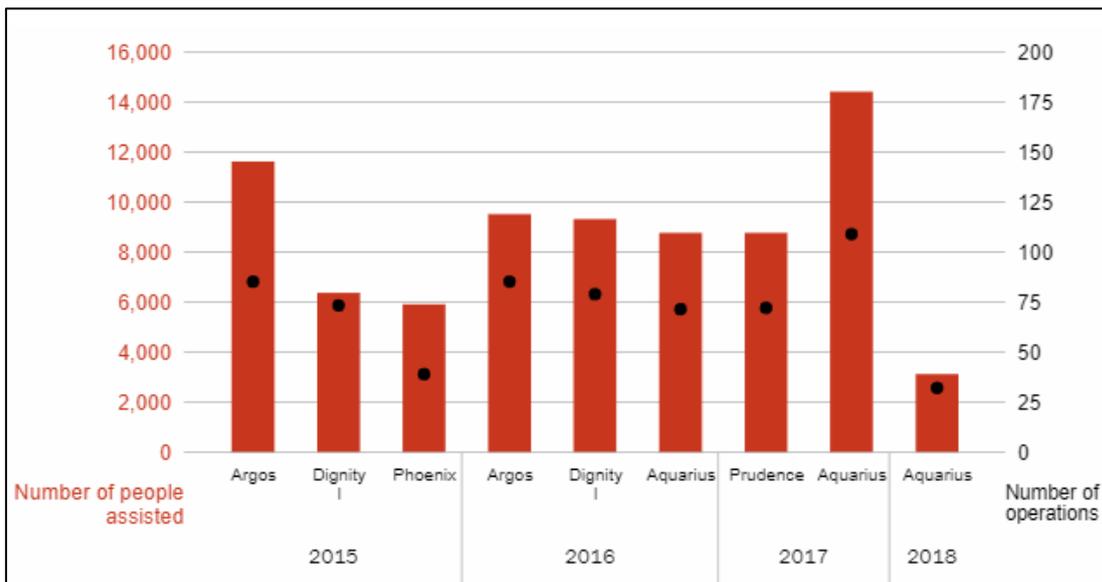


Figure 4: Search and rescue activities – overview. Source: Médecins Sans Frontières website in “Saving Lives at Sea”¹¹⁷.

¹¹⁷ Médecins Sans Frontières, *Saving Lives at Sea: Visualising Search and Rescue*. Data updated to August 2018. Available at: <http://searchandrescue.msf.org/> (Accessed: 02/11/2018)

The graph includes the number of people rescued and assisted with medical care, as well as those who were simply transferred to Médecins Sans Frontières' vessels. As it is possible to notice from Figure 4, since the beginning of its operation the NGO has worked with its own vessels, but has also cooperated with both the Migrants Offshore Aid Station in 2015 and SOS Méditerranée from 2016 to 2018. The largest number of rescues has been registered in 2017, when the Aquarius assisted around 14,385 people intervening in 109 operations.

4.4 Sea Watch.

Sea Watch is a Non-Governmental Organization founded in 2014 in Germany, and is involved in search and rescue operations of migrants in the Mediterranean area. The NGO team intervened with two vessels, Sea Watch 1, and Sea Watch 2. Sea Watch 1 took part in rescue procedures in May 2015 off to Lampedusa coast. Sea Watch 2 was created in 2016, and acted in particular in the stretch of sea between Libya and Italy, where the crew members, in that year only, were able to save about 20,000 people. Nevertheless, these two vessels had a limited capacity with respect to the huge number of people in distress, thus from 2017 the NGO has deployed the Sea Watch 3, a larger rescue ship, 55 meters long, which could guarantee a faster and more efficient service. From November 2017 to January 2018 this last vessel intervened in particular near the 24 nautical miles Libyan zone and contributed in saving approximately 1,500 people¹¹⁸.

4.5 Sea Eye.

In 2015 a group of volunteers led by Michael Buschheuer founded the Sea Eye Non-profit Organization with the objective of helping to save lives and preventing deaths in the Mediterranean. The Organization, exclusively financed by private donations, has intervened with two vessels, the Sea Eye and the Seefuchs, which entered into action respectively in February 2016 and in April 2017 off the Libyan coast. Since the staff of

¹¹⁸ Data provided by Sea Watch website. Available at: <https://sea-watch.org/en/> (Accessed: 01/11/2018)

this Non-Governmental Organization has begun to operate in rescue projects, they have assisted in saving nearly 14,378 people¹¹⁹. Due to the fact that its vessels have a modest capacity, Sea Eye's main tasks consist in searching for boats in distress, informing the MRCC through an immediate SOS signal, providing migrants with life jackets, and assisting them until a larger vessel takes them on board, but it does not deal with people transportation.

4.6 Jugend Rettet.

The Jugend Rettet (that in German means "Youth Rescue") is the name of another private association created in Berlin in October 2015, with the aim of helping migrants and preventing deaths in the Mediterranean. Subsidised exclusively by private donations, Jugend Rettet's contribution has been put into practice through the *Iuventa* boat, whose name derives from *Iuventas*, the roman deity of youth and courage. It is a 33-meter-long fishing vessel bought in the North Sea by a group of young volunteers who modified it in order to make it suitable for rescue operations. In July 2016 it started to operate in the Mediterranean area, and in its first mission it was able to assist 1,388 people. The following year, the *Iuventa* completed eight more missions with over 10,000 rescues¹²⁰.

4.7 ProActiva Open Arms.

The ProActiva Open Arms is a Non-Governmental Organization set up in October 2015 in Badalona, Spain, from a first-aid company led by Oscar Camps, which already had experience in the field of rescues along Spanish shores. The team is made up of volunteers, professionals and psychologists specialized in crisis situations and help migrants with post-traumatic stress disorders caused by fleeing and crossing the sea. The ProActiva Open Arms is a member of the International Maritime Rescue Federation, as

¹¹⁹ Data provided by Sea Eye website. Available at: <https://sea-eye.org/en/> (Accessed: 01/11/2018)

¹²⁰ Data provided by Jugend Rettet website. Available at: <https://jugendrettet.org/en/> (Accessed: 03/11/2018)

the only Spanish member. The volunteers started their intervention in early 2016 in the Greek islands, especially in Lesbos, which in that period represented the main gateway of more than 150,000 migrants. This emergency decreased with the 2016 agreement between the European Union and Turkey, but then new routes started and intensified in the Central Mediterranean. Therefore, in June 2016, aboard its vessel called Astral, this NGO was able to save 15,000 lives in four months. Then, on December 2016, they intervened again with the Golfo Azzurro, a fishing boat converted into a boat for rescues and equipped with all necessary medicines and kits. On this occasion, approximately 6,000 people were assisted in six months. Lastly, in June 2017, due to the relentless number of arrivals, ProActiva Open Arms had to undertake another mission, thus the Golfo Azzurro, along with the new organization's flagship called Open Arms boat, arrived in the Mediterranean Sea¹²¹. In 2018 ProActiva Open Arms was at the centre of an international case that will be analysed in more detail in chapter III, along with other similar events which created great debate around some NGOs' interventions.

5. The accusations brought against the NGOs.

The NGOs which have intervened in the Mediterranean have been subjected to various controversies. It is possible to identify the four most common charges brought against the aforementioned NGOs which have operated in search and rescue operations.

First of all, it is asserted that the Non-Governmental Organizations' vessels have frequently arrived too close to the Libyan coast, the starting point for a great deal of people, thus, this may have represented a pull factor for migrants who decided to leave and try to cross the Mediterranean Sea.

Secondly, it is said that the NGOs' substantial contribution in search and rescue operations is an element that has increased the number of deaths at sea, since it is said that more vessels laden with migrants attempted the crossing from the time NGOs started to intervene, and smugglers, counting on NGOs' rescues, also decided to use poorer quality and more dangerous boats and dinghies liable to capsizing.

¹²¹ Data provided by ProActiva Open Arms website. Available at: <https://www.proactivaopenarms.org/en> (Accessed: 03/11/2018)

Thirdly, in some cases financing of NGOs is not transparent, since it is not always clear and declared who is funding the NGOs to sustain all the necessary costs their operations require. Thus, an accusation brought against them regards the fact that NGOs may be in agreement with migrants' smugglers and their criminal networks, receiving money from them for their services.

Lastly, NGOs are accused of bringing migrants especially to Italy because they are collaborating with the local reception business.

This suspicious climate around NGOs started on 15 December 2016, when the British newspaper Financial Times published an article about a Frontex confidential report in which alleged links between Non-Governmental Organizations and migrants' smugglers were denounced¹²². These charges were supported by the Frontex' director, Fabrice Leggeri, who in an interview with the German newspaper Die Welt, accused NGOs of being a pull factor for migrants who flee from Libya¹²³. Moreover, he called for a reevaluation of NGOs actions considering their suspicious lack of cooperation with the security agencies which are working against migrants' smugglers.

Indeed, the doubt about the origin of the NGOs' funds acquired great resonance in April 2017, when an interview with the Catania chief Prosecutor Carmelo Zuccaro was published in the Italian newspaper La Stampa¹²⁴. He claimed to be in possession of some documents drawn up by intelligence and by Frontex, where unequivocal evidence of the direct contact between NGOs and smugglers were declared. Hence, he decided that Catania's Public Prosecutor Office should open an investigation into the NGOs' sources of financing.

Since the doubts began to spread, the Defence Commission of the Senate launched two public hearings with the purpose of inquiring into this charge of connection between NGOs and migrants' smugglers. The public hearings included representatives of all Organizations operating in the Mediterranean Sea, who were interrogated and proclaimed their innocence.

¹²² Duncan ROBINSON, *Death in the Mediterranean, the role of NGOs*, The Financial Times, 15 December 2016. Available at: <https://www.ft.com/content/e294e3d1-e754-3a9d-ab53-b87359a330ca> (Accessed: 28/11/2018)

¹²³ Patrick WINTOUR, *NGO rescues off Libya encourage traffickers, says EU borders chief*, The Guardian, 27 February 2017. Available at: <https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief> (Accessed: 05/11/2018)

¹²⁴ Fabio ALBANESE, *Abbiamo le prove dei contatti fra scafisti e soccorritori*, La Stampa, 23 April 2017. Available at: <https://www.lastampa.it/2017/04/23/italia/cronache/abbiamo-le-prove-dei-contatti-tra-scafisti-e-alcuni-soccorritori-3fCnqLKWWRHBVUiygHv65K/pagina.html> (Accessed: 08/11/2018)

These accusations have opened a broad debate in Italy, where they have been supported in particular by the right-wing parties, such as Lega Nord and Forza Italia. On the contrary, the Italian Centre-left democratic party, as well as the European Commission, have stood by the NGOs, believing in their innocence.

5.1 The defence of the NGOs against the accusations.

All NGOs have always firmly denied any collusion with migrants' smugglers and have declared they feel victims of a smear campaign created in the attempt to seal European borders and reject migration flows. The Non-Governmental Organizations members continue to sustain that their actions are essential due to the shortcomings of the European Union which has not deployed sufficient missions to deal with the humanitarian emergency, and now this attempt to tarnish them has the sole aim of diverting attention from the states' deficiencies.

Moreover, in response to the charges, the NGOs innocence has been supported by the reports *Death by rescues*¹²⁵ and *Blaming the rescuers*¹²⁶, produced by the Forensic Oceanography researchers' group, and published respectively in 2016 and 2017. Considering the four accusations described above, the reports assess them and provide elements to rebut the allegations.

Firstly, the authors Heller and Pezzani deny that the NGOs may represent a pull factor, since analyses demonstrate that their intervention was not the driver of increasing arrivals. The higher number of arrivals recorded along the Central Mediterranean in 2016 is absolutely consistent with the higher number of crossings by African migrants (mainly from Sub-Saharan, West Africa and the Horn of Africa) carried out in the previous period 2014-2015¹²⁷, when the intervention of NGOs was quite limited. No causality link can be proved between the two phenomena. In addition, from 2015 to 2016 a 40% increase of arrivals

¹²⁵ Charles HELLER et al., *Death by rescues: the lethal effects of the EU's policies of non-assistance*, 2016. Available at: <https://deathbyrescue.org/> (Accessed: 05/11/2018)

¹²⁶ Charles HELLER et al., *Blaming the rescuers: criminalizing solidarity, re-enforcing deterrence*, 2017. Available at: <https://blamingtherescuers.org/> (Accessed: 06/11/2018)

¹²⁷ Frontex, *2017 Annual Risk Analysis*, 15 February 2017, p. 32. Available at: [https://frontex.europa.eu/assets/Publications/Risk Analysis/Annual Risk Analysis 2017.pdf](https://frontex.europa.eu/assets/Publications/Risk%20Analysis/Annual%20Risk%20Analysis%202017.pdf) (Accessed: 06/11/2018)

from Morocco was registered, in the absence of any NGOs search and rescue mission in that area and in that period. Instead, the major role in pushing migrants to leave and start the crossings was the worsening conditions of the conflict in Libya and of several African regions, where migrants left “driven by regional security issues, slow economic development, and lack of long-term livelihood options¹²⁸”, as Frontex recognises in its report. As a consequence, the NGOs interventions (coordinated by the Italian Coast Guard) close to the Libyan coasts was necessary, in particular from 2016, in order to prevent situations of imminent distress, since the Libyan Coast Guard on many occasions intercepted migrants’ boats and exercised violence on them, at times causing boats to capsize. The NGOs’ presence in this area is therefore a necessary safety factor for migrants. Secondly, regarding the fault attributed to NGOs of having incentivized the crossings and consequent deaths at sea, as described in *Death by rescue* report, it was precisely the end of Mare Nostrum Operation, decided by the European states and Agencies, that left a gap in search and rescue operations. The aim was to discourage migrants from leaving, while it instead led only to an increase of deaths at sea. This was even recognized in retrospect by the President of the European Commission, Jean-Claud Juncker, who admitted that “It was a serious mistake to bring the Mare Nostrum operation to an end. It cost human lives¹²⁹”. Furthermore, it is true that from 2015 smugglers have started to use bad quality rubber boats, with fewer provisions of water and food on board, often overloaded and allowed to leave even in adverse weather conditions. Nevertheless, NGOs responded to and were not the cause of these practices. In particular, it was the EUNavFor Med operation that had an unequivocal impact on smugglers’ tactics, since it established to destroy all vessels used by migrants’ smugglers. Therefore, this pushed them to look for cheaper solutions. Additionally, this shift to poorer materials was noted in 2015, when the presence of NGOs was still limited.

Moreover, concerning the third charge, i.e. that NGOs could be financed by migrants’ smugglers, actually there is no clear proof that this occurs. The allegations supported by the

¹²⁸ Frontex, *2016 Annual Risk Analysis*, 5 April 2016, p. 42. Available at: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf (Accessed: 09/11/2018)

¹²⁹ European Commission, *Speech by President Jean-Claude Juncker at the debate in the European Parliament on the conclusions of the Special European Council on 23 April: ‘Tackling the migration crisis’*, 29 April 2015. Available at: http://europa.eu/rapid/press-release_SPEECH-15-4896_en.htm (Accessed: 06/11/2018)

chief Prosecutor Zuccaro were never confirmed by any factual element and the documents he claimed to possess have never been made public. Finally, the Prosecutor himself denied the existence of real proof.

The Defence Commission of the Senate as well, after the two public hearings, concluded that no evidence emerged which could determine guilt. However, it added that from that point forward NGOs should be put under greater control, should always be subject to the full command of the MRCC, and should accept that police can travel on board or can embark and survey any rescue operation. In addition, all ship crews and financial backers should be registered¹³⁰.

Finally, concerning the last charge about the reception business, here again no evidence was found that could confirm any collaboration between Italian reception facilities and NGOs, and it remains an unfounded accusation.

In Italy, different associations expressed their opinion about the issue. Silvia Stilli, spokeswoman of the AOI Association (Associazione delle Organizzazioni Italiane di Cooperazione e Solidarietà Internazionale), along with CINI (Coordinamento Italiano delle ONG Internazionali) and “Link 2007 Cooperazione in rete”, voiced her indignation over the unsubstantiated accusations brought against NGOs for reasons which, in her opinion, are exclusively political, and invited the Italian Parliament to evaluate such disparaging statements. In fact, by means of mass media, they can negatively influence public opinion and undermine the trust of citizens and individuals who support NGOs and maintain a long-standing cooperation with them¹³¹.

Non-Governmental Organizations members, besides rebutting all the charges, propose that European countries should undertake a reorientation to a policy that would create legal channels of entry and grant safe passage for migrants. This would deter the smugglers and stop the list of recorded deaths at sea from growing.

¹³⁰ *Documento Conclusivo Sull'indagine Conoscitiva Sul Contributo Dei Militari Italiani Al Controllo Dei Flussi Migratori Nel Mediterraneo E Sull'impatto Della Attività Delle Organizzazioni Non Governative*. Available at: <http://www.senatoripd.it/gCloud-dispatcher/a686fe29-3a4a-11e7-a4b5-001b21be4498> (Accessed: 09/11/2018)

¹³¹ COOPI, *Le ONG rispondono a testa alta alle accuse, continuando a salvare vite umane*, 26 April 2017. Available at: <https://www.coopi.org/it/ong-rispondono-accuse-salvare-vite-umane-2765.html> (Accessed: 09/11/2018)

6. The crisis of the regulatory model after the increasing intervention of new subjects at sea.

The maritime laws analysed up to now have been drafted regarding specific actors that currently are no longer the only ones on the international scene. In particular, the law of the sea is specifically based on a vision developed under the Westphalian model of international law, which regulates relationships among sovereign and independent states, which are both the only subjects and main recipients of its rules. This model does not consider in detail individuals nor private entities, like NGOs. This way of understanding international law has been the subject of attacks during recent years with the evolving of human rights, which have forcibly put the attention on individuals. However, only recently have human rights had an impact on the law of the sea, while the UNCLOS itself does not deal so much with persons, only incidentally.

Therefore, it is possible to say that there is a legal vacuum regarding the necessity of applying norms created for states in those situations in which not states but non-state actors, such as NGOs, are acting. The international law is based on the idea that only states and individuals can be involved in operations at sea: private individuals carry out their own activities such as travel, fishing, transport of goods, while states pursue public purposes, including search and rescue activities, occasionally helped by individuals, when the need arises.

Nevertheless, as we have seen, after the end of the Mare Nostrum Operation a great deal of NGOs entered the scene in response to the humanitarian crisis, and their presence provided a change to the existing framework, since their vessels have their own characteristics that distinguish them both from private boats and public ships (such as Navy, Coast Guard, Guard of Finance). In fact, they carry out similar tasks to the latter, but unlike them, they are not regulated by the law of the sea but by common rules. Moreover, concerning the place where persons rescued at sea can be disembarked, states should comply with the specific laws described in previous chapter, while NGOs should only comply with the coastal state's consensus, which is not always guaranteed.

Therefore, the NGO position can be collocated between the public and private sphere: when a NGO vessel move towards a boat in danger it acts as a private vessel, complying with obligations set out for all ships, as established by the UNCLOS, SAR and SOLAS Conventions, besides customary law. At the same time, they operate under the MRCC

control, in fact replacing public ships, navigating in those areas where the need arises the most, patrolling waters as public vessels.

Besides the main difficulties represented by the lack of regulation about disembarkation of rescued persons and the necessity to coordinate operations with SOLAS and SAR rules and with the principle of non-refoulement, norms specifically regarding NGOs operations should be added to the main critical issues. In fact, rules do not consider that NGOs activities are not temporary but continuative, and do not try to benefit from the means offered by NGOs, since actually, they have the advantage of both increasing the vessels available for the coastal state for effective search and rescue operations, and alleviating the burdens that otherwise would be borne by commercial and fishing vessels crossing the Mediterranean.

Some gaps emerge from these considerations. In order to fill this legal vacuum, in recent years some attempts have been made to regulate NGOs activities, by drafting some Codes of Conduct.

6.1 The Voluntary Code of Conduct for Search and Rescue Operations undertaken by civil society Non-Governmental Organizations in the Mediterranean Sea.

In February 2017 the British charitable organization Human Rights at Sea drafted the first Voluntary Code of Conduct for NGOs which intervene in search and rescue operations in the Mediterranean area¹³². It is the product of all suggestions made in Valencia during the SOLIMED Conference, where the NGOs members claimed the need for enhanced cooperation among SAR NGOs to improve the handling of migrant flows.

Consistent with existing SAR Conventions as well as human rights principles, the Code provides a guidance with rules and standards, set up to increase the level of cohesion among NGOs and deliver a comprehensive humanitarian approach along with all the other stakeholders, including the European Agencies, the Rescue Coordination Centres, state and non-state actors which are involved in the Mediterranean area.

¹³² Human Rights at Sea, *Voluntary Code of Conduct for Search and Rescue Operations undertaken by civil society Non-Governmental Organizations in the Mediterranean Sea*, February 2017. Available at: <https://www.humanrightsatsea.org/wp-content/uploads/2017/03/20170302-NGO-Code-of-Conduct-FINAL-SECURED.pdf> (Accessed: 09/11/2018)

The main objective is to make all stakeholders agree on common standards of ethics and operational conduct in order to guarantee the most effective SAR operations. The Code also has the aim of ensuring increased transparency about all NGO actions, so as to dispel the doubts about them and consequent mistrust caused by the abovementioned accusations.

The Code directs both individual and joint-coordinated NGOs interventions before they are implemented. In this way, greater cohesion can be reached, maximizing efficiency.

It is based on five main principles which should always be respected and should guide volunteers' actions: humanity, impartiality, neutrality, independence, and transparency.

In fact, it states that the act of saving a person in distress should always be guided by humanitarian principles, should be felt as a moral obligation, and it should never be a partisan or political act. SAR missions can never have religious, racial, or political background, but they should always be impartial. They should not take sides between state and non-state actors, but should maintain a neutral stance. NGOs' SAR operations should be carried out independently from governments, armies or any other pressure that could exploit them as a political tool. Lastly, NGOs should be encouraged to communicate to each other all information that could be useful in the interests of conducting the SAR operations as effectively as possible. For instance, each incident should be recorded, in order to inform other actors of possible mistakes and give advice that could improve future missions.

Regarding operational conduct, the Code defined Standard Operation Procedures. First of all, members should always share pre-mission considerations and in-mission procedures. When acting in the same SAR zone, NGOs should join efforts and establish common assessments and actions, updating one another with possible security threats or any other issue. Open dialogue should be frequently held among all SAR NGOs, to constantly seek improvement. A platform or a network should be created in order to increase awareness and promote speedy actions in providing support among NGOs which intervene in the same area. In this way, members could also discuss new policies and further developments of future SAR operations in the Mediterranean Sea.

Human Rights at Sea considers this Code a starting point for further development and cooperation among the parties.

Among the seven NGOs mentioned in the previous paragraphs, five of them are signatories of this Code, with the exception of Médecins Sans Frontières and Migrants Offshore Aid Station.

6.2 The Italian Code of Conduct for NGOs involved in Migrant Rescue Operations at Sea.

On 6 July 2017, during a meeting with the European Commission at Tallinn, the Italian Minister of Interior Minniti proposed a new Code of Conduct for NGOs about search and rescue operations conducted in the Mediterranean Sea¹³³. By analysing it, it becomes clear that it was drafted in order to prevent NGOs from carrying on all those actions for which they have been accused, encouraging transparency and preventing any conceivable collusion with migrants' smugglers.

This Code presented clear differences with respect to the abovementioned Code drafted by Human Rights at Sea just five months earlier. For instance, the principles of cooperation, cohesion and communication among the NGOs, that were the cornerstones of the previous Code, are now neither supported nor considered. On the contrary, signatory NGOs are obliged not to make telephone communications or send light signals, so as not to facilitate contacts with traffickers. Moreover, vessels which are conducting the rescue missions are required not to make trans-shipments on other vessels, but the operators must find by themselves a safe harbour for migrants and complete the operation autonomously. The only cooperation form which is supported in this Code is between NGOs and Authorities: in fact, organizations are obliged to work together with Public Security Authorities of migrants landing locations, and with the Italian Police Authorities, informing them about any evidence of illegal acts. In addition, the non-profit organizations' members must always notify the MRCC of their own flag state each sighting and intervention, besides allowing on board judicial public officers whenever the need for investigations related to human trafficking arises. In order to be always traceable and identifiable, vessels are required to never turn their transponders off.

¹³³ *Code of Conduct for NGOs involved in Migrants' Rescue Operations at Sea*. Available at: <http://statewatch.org/news/2017/jul/italy-eu-sar-code-of-conduct.pdf> (Accessed: 10/11/2018)

Consistently with the aim of improving NGO transparency, each organization is obliged to declare all sources of financing for its rescue operations at sea.

Another main difference with respect to the previous Code concerns the spaces of intervention. While in the former Code rescue activities are encouraged wherever people in distress are, the latter Code restricts the field of action by excluding Libyan waters. In fact, the first principle listed concerns the absolute ban of intervention for NGOs in this part of the Mediterranean Sea, with the only exception of a situation characterized by an evident danger for human life. It is not difficult to tie this obligation to the accusation of NGOs of being a pull factor for migrants leaving from Libyan shores. Indeed, the Code invites organizations not to obstruct the search and rescue activities carried by the Libyan Coast Guard, leaving control of territorial waters to the competent authorities without interfering.

The Code of Conduct entered into force on 31 July 2017. Up to now, it has been signed by MOAS, Save the Children, SOS Méditerranée, ProActiva Open Arms, Sea Watch and Sea Eye.

On the contrary, Médecins Sans Frontières and Jugend Rettet still refuse to join it. In particular, Médecins Sans Frontières on its website explains that in its opinion the application of the Code reduces the rescue capacity rather than promoting it, since it seems to be more a political project with other priorities than the life-saving imperative¹³⁴. Jugend Rettet, for its part, clarifies its refusal as a commitment to respect all international maritime laws that the Code, in some cases, does not seem to consider¹³⁵.

On the other hand, some of the signatories have motivated their decision to join the Code of Conduct. For instance, the MOAS declared that if the only legal way to continue its mission of saving lives was to adhere to the Code, then it could not possibly hold back¹³⁶. SOS Méditerranée, initially reluctant, on 11 August 2017 was persuaded to sign, after a meeting with the Head of Civil Liberties and Immigration at the Ministry of Interior in

¹³⁴ Médecins Sans Frontières, *Q&A: Why MSF didn't sign the Code of Conduct for Search and Rescue*, 2 August 2017. Available at: <https://www.msf.org/qa-why-msf-didnt-sign-code-conduct-search-and-rescue> (Accessed: 13/11/2018)

¹³⁵ Jugend Rettet, *Free Juventa – Sea Rescue is not a crime*. Available at: <https://jugendrettet.org/en/> (Accessed: 13/11/2018)

¹³⁶ MOAS, *MOAS Statement On The Signing Of The Code Of Conduct For Search And Rescue In The Mediterranean*. Available at: <https://www.moas.eu/moas-statement-signing-code-conduct-search-rescue-mediterranean/> (Accessed: 13/11/2018)

Rome, where some amendments to the Code were decided and drafted in an additional document¹³⁷. First of all, it was added that the Code shall not be legally binding and international laws and regulations shall prevail on it. Then, the NGO declared it would not welcome on board any armed person, unless with a specific mandate, and police officers received aboard should not interfere in any manner with the rescue operations. Lastly, necessary trans-shipments of migrants to other vessels should be allowed, provided that they occur under the complete MRCC Rome coordination.

Equally, Sea Watch joined on 18 October 2017 only after an addendum had been made, in the wake of the amendments requested by SOS Méditerranée. Among other things, the NGO imposed the total respect of the provisions of the UNCLOS, besides establishing that its vessels are not required to follow instructions from the Libyan Coast Guard, unless they are in the 12 maritime miles of their exclusive competence¹³⁸.

Although the Code of Conduct could not be considered as an act of the European Union, it is another example of the process of externalization of borders¹³⁹. Indeed, the Code is part of a wider strategy aiming at decreasing the number of irregular migrants through measures undertaken outside European borders. As previously said, further examples of this process are the EU-Turkey Statement and the Memorandum of Understanding between Libya and Italy.

The ASGI (Associazione per gli Studi Giuridici sull'Immigrazione) expressed its considerations about the Code of Conduct. It is an Italian association made up of lawyers, legal experts, and university professors, which has contributed with documents and debates to the drafting of legislative texts on immigration, asylum, and citizenship, promoting the protection of foreigners' rights. The ASGI members promote anti-discriminatory actions and they have intervened in courts with civil and criminal appeals

¹³⁷ SOS Méditerranée, *SOS Méditerranée signs amended version of the Code of Conduct during meeting in Rome*, 11 August 2017. Available at: <http://old.sosmediterranee.org/sos-mediterranee-signs-code-of-conduct/?lang=en> (Accessed: 13/11/2018)

¹³⁸ Sea Watch, *Sea Watch comes to an agreement concerning the Code of Conduct*, 18 October 2017. Available at: <https://sea-watch.org/en/sea-watch-comes-to-an-agreement-concerning-the-code-of-conduct/> (Accessed: 13/11/2018)

¹³⁹ Federico FERRI, *Il Codice di Condotta per le ONG e i diritti dei migranti: fra diritto internazionale e politiche europee*. At: *Diritti Umani e Diritto Internazionale*, 1/2018, p. 191.

of national relevance in the context of proceedings and cases concerning anti-discrimination laws¹⁴⁰.

On 24 July 2017 the ASGI published a Position Paper¹⁴¹ where it expressed its considerations regarding the abovementioned Code of Conduct for NGOs proposed by the Italian Government a few days earlier. Here, the main consequences and risks which may arise from the approval and signing of the Code are analysed.

First of all, the ASGI affirms its complete support to NGOs and their search and rescue operations, during which they take charge of those responsibilities that states and European institutions are unable or unwilling to fulfill. Moreover, the association ensures its approval of the Voluntary Code of Conduct and encourages the efforts of the NGOs which undertake to self-regulate the operational aspects of SAR missions through cooperation and determination.

On the contrary, the jurists assert their disapproval of the adoption of the proposed Code of Conduct, which they consider as

“part of a broader strategy aimed at blaming NGOs for practicing solidarity and active promotion for human rights in the context of migrations¹⁴².”

Moreover, they strongly oppose the accusations that see NGOs as a pull factor for migrants or as collaborators of migrants’ smugglers, since these charges have no factual evidence. They argue that NGOs have always operated in compliance with those maritime rules that the Code of Conduct intends to stress, such as navigating with transponders on, and acting under MRCC full control.

The Code has been presented to the European Commission as a voluntary and agreed document, nevertheless actually it comes out as a political tool with which the Government can exercise regulatory power¹⁴³. This is supported by the fact that it ends

¹⁴⁰ ASGI, Associazione per gli Studi Giuridici sull’Immigrazione. Available at: <https://www.asgi.it/> (Accessed: 12/11/2018)

¹⁴¹ ASGI, *Position Paper on the Proposed “Code of Conduct for NGOs involved in Migrants’ Rescue at Sea”*, 24 July 2017. Available at: https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf (Accessed: 12/11/2018)

¹⁴² Ivi, p. 1, par. 1.

¹⁴³ ASGI, *Position Paper on the Proposed “Code of Conduct for NGOs involved in Migrants’ Rescue at Sea*, cit., p. 2, par. 2.

with a threat of sanction: the access to Italian harbours is denied for the vessels of those NGOs which have not signed the Code or have not respected all its provisions. The ASGI is concerned with underlining and clarifying that the Code represents an agreement proposal among the parties involved, and it is not an act having the force of law. This does not legitimize any government reaction towards non-signatory parties (except for the cases established by national and international laws).

Furthermore, it seems that Italy is using the Code to regulate the conduct of vessels sailing in waters that are not under its jurisdiction according to international law, or of vessels flying a third state's flag¹⁴⁴: some provisions, in fact, aim at regulating the conduct of all vessels with respect to Libyan territorial waters or high seas. This stands in stark contrast to international law of the sea, in particular to the 1982 UN Convention on the Law of the Sea (UNCLOS). In fact, article 2(1) of the UNCLOS establishes that only the coastal state can exercise jurisdiction on its territorial waters. Italy cannot even claim jurisdiction referring to the port state jurisdiction doctrine: it must be considered just as subsidiary to the flag state's doctrine and can be used in exceptional cases only, for instance with respect to harmful activities and conduct towards the port state, when the flag state cannot exercise enforcement jurisdiction. Then, neither international law nor international practice allows the port state's jurisdiction towards vessels which perform search and rescue operations in the high seas and claim access to the port.

In addition, a state may not, in principle, deny access to its ports to a vessel who flies its own flag, and, according to international law, it can only regulate access to vessels with a third state's flag. This rule, however, finds a limit for foreigners' vessels in situation of distress.

Article 17 of the UNCLOS ensures the right of innocent passage to all vessels in the territorial waters of all states, and article 21(1) entrusts the coastal state with the responsibility of guaranteeing this right. The passage could also include a stop when necessary, for situations of distress or for the purpose of rendering assistance to persons, ships or aircrafts in danger (article 18). Moreover, it is fundamental to underline that, according to the law of the sea, the obligation to save life must apply to all maritime areas. Thus, the ban on entry to Libyan waters decided by Italy, not only is an unjustified

¹⁴⁴ ASGI, *Position Paper on the Proposed "Code of Conduct for NGOs involved in Migrants' Rescue at Sea*, cit., p. 2, par. 3.

exercise of jurisdiction, but also results in a lack of intervention for those NGOs which would protect lives in that part of the Mediterranean Sea. This clearly represents a violation of international law.

The ASGI Position Paper then considers the provisions of the proposed Code of Conduct from the point of view of human rights. Some measures laid down in the Code might have the effect of diminishing the NGOs' general capacity to save lives at sea¹⁴⁵. This is the case of the absolute ban of trans-shipment of migrants to other vessels, even in situations in which this could be of extreme necessity. Also, the obligation not to make telephone communications or send light signals could have the effect of preventing actions that could be fundamental during the course of search and rescue operations. The prohibition of these actions might hinder the outcomes of bailouts, and this would trigger the international responsibility of Italy.

Moreover, denying access to Italian ports may be seen as a violation of article 2 and 3 of the European Convention on Human Rights¹⁴⁶ which respectively protect the right to life, and physical and moral integrity, in every area under a state jurisdiction (art. 1).

Furthermore, a ship when in high seas is under the exclusive jurisdiction of its own flag state (art. 92 UNCLOS): as a consequence, Italy cannot impose the presence of Italian law enforcement officials on board, without infringing a sovereign right of the flag state. Finally, the Code asks NGOs not to hinder the operations of the Libyan Coast Guard. This statement is not clear, since it could be inferred that, on some occasions, NGOs have interfered before the drafting of the Code, endangering the people involved in the rescue activities. This does not correspond to the reality of facts: on the contrary, the Libyan Coast Guard has been documented as having acted in a dangerous way, disregarding the basic rules of safety at sea. In addition, up to now NGO missions in that part of the sea have always taken place under the MRCC of Rome control, because the Libyan authorities failed to provide rescue operations in the area theoretically under their responsibility. The Action Plan of the European Commission¹⁴⁷ has implicitly recognized

¹⁴⁵ ASGI, *Position Paper on the Proposed "Code of Conduct for NGOs involved in Migrants' Rescue at Sea*, cit., p. 3, par. 4.

¹⁴⁶ Council of Europe, *European Convention on Human Rights*, 4 November 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (Accessed: 12/11/2018)

¹⁴⁷ European Commission, *Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*, 4 July 2017. Available at: <https://ec.europa.eu/home->

that Libya is still not able to shoulder the responsibility of search and rescue operations¹⁴⁸. Furthermore, it has been documented that the situation for migrants in Libya has sometimes been critical, with violent treatment frequently reported, such as tortures, sexual violence, arbitrary detention, which has also been described in a report published in 2016 by the United Nations¹⁴⁹. Thus, the request not to interfere with the Libyan Coast Guard allows them to bring migrants back to Libyan shores, and this can be considered as a violation of the non-refoulement principle, of article 33 of the 1951 Geneva Convention and article 3(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The association firmly calls on the Italian Government to review its political line, which results as both inconsistent in terms of legitimacy and dangerous in undermining the effectiveness of the rescue activities.

With no turnaround towards a solidarity approach to the issue of migration, the management of migration flows in the EU will be more and more directed towards an external action, hence accelerating the externalization of border process, instead of being addressed to the safeguard of migrants' fundamental rights. Therefore, the Code of Conduct, under a supranational perspective, symbolises the crisis of those values enshrined in article 2 of the TFEU¹⁵⁰.

7. The human rights violations in Libya and the need for NGO intervention.

In order to better understand the criticisms about the Code's provisions, it is relevant to analyse the issues that characterise the situation in Libya. Despite armed conflicts that destabilize the country since the end of Ghedaffi's regime, Libya represents an important transit and destination country for all those people who are fleeing from poverty, wars

[affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf](#) (Accessed: 12/11/2018)

¹⁴⁸ European Commission, *Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*, cit., p. 2.

¹⁴⁹ Office of the United Nations High Commissioner for Human Rights, *"Detained and Dehumanised" Report on Human Rights Abuses Against Migrants in Libya*, 13 December 2016. Available at: https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (Accessed: 12/11/2018)

¹⁵⁰ Federico FERRI, *Il Codice di condotta per le ONG e i diritti dei migranti*, cit., p. 197.

and persecution. Nevertheless, the conditions for migrants in this country turned out to be really hard and the relationship between Libya and the other Mediterranean states got worse when those conditions came to light.

In fact, a great deal of people reported having suffered there from physical and psychological abuse, rapes, tortures and kidnappings carried out against both men and women by traffickers, armed groups and criminal gangs. Refugees and migrants sometimes reported having been arrested and imprisoned in detention centres in inhuman conditions, with no access to medical care, not enough food, drinking water and sanitary facilities. In addition, the detainees affirm no one took them before a judge or allowed them to contest their detention. It is important to underline that this is illegal, since prolonged detention with no judicial review is considered arbitrary detention, forbidden by international law. However, Libya has never shown great interest towards the respect of migrants' rights, since it has refused to ratify the 1951 Refugee Convention.

The abuses frequently denounced, has led the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct an investigation which ended in a report, published by the Human Rights Council on 15 February 2016¹⁵¹. It details the widespread violence, and outlines the situation in Libya not only of migrants but also of journalists, human rights defenders, children, and administrators of justice. In the end, it addresses all parties involved: The Government, the international community, the Human Right Council, and the Security Council, urging them to encourage the end of hostilities in the country and a move towards a state based on respect for laws and human rights, besides providing an effective remedy to all persons whose rights have been violated.

The witnesses of these treatments have been reported also by numerous newspapers and associations worldwide, like Human Rights Watch¹⁵². In its documents it states that approximately 20 centres in Libya are directed by the Department for Combating Illegal Migration, under the Interior Ministry, which is controlled by the internationally recognized Government of National Accord. However, there is in the country a great deal

¹⁵¹ OHCHR, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya*, 15 February 2016. Available at: https://www.ohchr.org/Documents/Countries/LY/A_HRC_31_47_E.pdf (Accessed: 14/11/2018)

¹⁵² Human Rights Watch, *EU/NATO: Europe's Plan Endangers Foreigners in Libya. Migrants, Asylum Seekers Face Killings, Torture, and Rape*, 6 July 2016. Available at: <https://www.hrw.org/news/2016/07/06/eu/nato-europes-plan-endangers-foreigners-libya> (Accessed: 14/11/2018)

of other non-official detention facilities which instead are run by smugglers and militias. In particular, the report names the Tripoli, Zawiya and Sabratha centres, described as especially overcrowded, dirty and with highly insufficient food.

In many cases, it is precisely these violent behaviours and dire conditions the main reasons that push migrants to leave the country as soon as possible and try the crossings of the Mediterranean Sea. It was after these revelations that on 20 June 2016 the European Union, supported by NATO, extended its naval operation in the Mediterranean and included the training of the Libyan Coast Guard, which intercepted boats and took them back to Libya's shores. The EU, under international law, may not permit people rescued to be sent back to Libya, since it is not a "place of safety" and their life in that country is threatened¹⁵³.

Furthermore, the IOM undertakes to provide data collection about migrants' flows through and from Libya and publishes the results in its periodical *Libya's Migrant Reports*. Only in the period October- November 2017 it has identified 432,574 migrants in the main locations (Tripoli, Misrata and Almargeb), but estimated the number in the whole country to be around 1 million. More recently, the IOM has published its report concerning the more recent period July-August 2018: the analyses have detected the presence of 669,176 migrants¹⁵⁴.

Therefore, since the number of migrants in this country is growing and the respect of human rights, as reported, is not ensured, other states and NGO interventions can be considered as fundamental. Nevertheless, these actions result in contrast with the aforementioned Code of Conduct and its provision not to intervene near the Libyan coasts. In addition, the fact that Libya has decided to establish its SAR zone, extended up to 70 miles from its coast, and does not permit access to anyone, has impeded NGOs' activities. However, given the obligation under international law for a coastal state to do everything possible in order to ensure an effective search and rescue system availing itself for this purpose of all available means, the exclusion of NGO private vessels or the hindrance to their rescue operations can be considered as a violation of the state's responsibilities.

¹⁵³ This would be against the non-refoulement principle. Cf. article 33 of the 1951 Refugee Convention.

¹⁵⁴ IOM-OIM Displacement Tracking Matrix, *Libya's Migrant Reports*, July-August 2018. Available at: <http://www.globaldtm.info/libya/> (Accessed: 28/11/2018)

Despite this violation, the service of all NGOs in this area is currently decreased, even if everyone is aware of the seriousness of the situation and the great need for intervention to safeguard migrants' human rights.

CHAPTER III

THE PROTECTION OF MIGRANTS' HUMAN RIGHTS AND ANALYSES OF SPECIFIC CASES.

1. The international and European legislation that aims at protecting migrants' human rights.

“Under international law, migrants have rights by virtue of their humanity¹⁵⁵.”

All international treaties and agreements regarding human rights, since they refer to any human being, obviously apply to migrants too. However, some provisions are specifically related to the condition of migrants and some articles define rights which concern them in particular.

The respect of migrants' rights by states may be evaluated in principle or in practice: the former refers to signatures and ratifications of documents which aim at protecting migrants, the latter refers to the fact that these rights are actually respected and exercised (even if this consideration may sometimes be inaccurate, due to lack of precise data and information). For instance, according to the case of Libya described in the previous chapter, this country ratified twelve treaties on human rights, however in practice, as we have seen, rights are not always respected there.

The following Figure 5 shows the status of ratifications in the countries of the Mediterranean area of the eighteen existing International Human Rights Treaties, according to the United Nations Treaty Collection.

¹⁵⁵ IOM, Migration Data Portal, *Migrant rights*, 11 July 2018. Available at: <https://migrationdataportal.org/themes/migrant-rights> (Accessed: 19/11/2018)

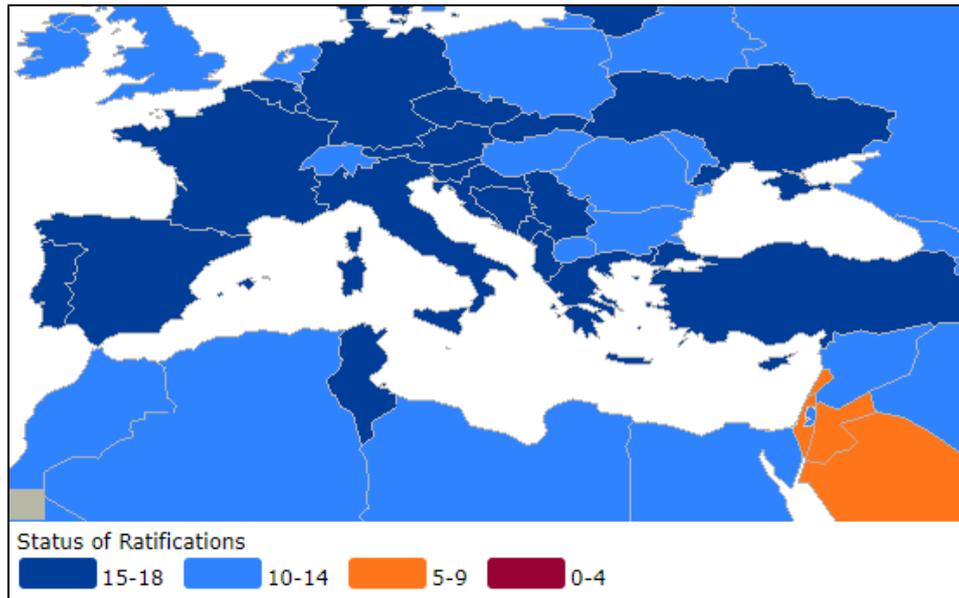


Figure 5: Status of ratifications of 18 International Human Rights Treaties. Source: the indicator is produced by the OHCHR according to the database of the United Nations Office of Legal Affairs (OLA)¹⁵⁶.

From Figure 5 is possible to see that the countries of the Mediterranean area have ratified a large number of treaties protecting human rights. In particular, seventeen treaties have been ratified by Italy, France and Spain, followed by Turkey with sixteen ratifications. Greece, Cyprus and Tunisia have granted their support to fifteen treaties, Malta fourteen, Morocco thirteen, and finally Libya and Algeria have approved respectively twelve and eleven treaties.

1.1 The Universal Declaration of Human Rights.

Among the many documents drafted on the topic, the Universal Declaration of Human Rights is certainly of extreme importance. It was adopted by the United Nations General Assembly on 10 December 1948 in Paris, with the Resolution 217 A¹⁵⁷, and its drafting was based on the principles enshrined in the Bill of Rights, The United States Declaration

¹⁵⁶ OHCHR, *Status of Ratification Interactive Dashboard*. Available at: <http://indicators.ohchr.org/> (Accessed: 22/11/2018)

¹⁵⁷ UN, Resolution Adopted by the General Assembly 217 A (III), *Universal Declaration of Human Rights*, 10 December 1948. Available at: <http://www.un-documents.net/a3r217a.htm> (Accessed: 19/11/2018)

of Independence, as well as the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789.

The Universal Declaration of Human Rights was the source which inspired all subsequent Conventions on human rights. It is a very important historical document, written by the Allies after the end of the Second World War, in response to the significant damage suffered. It became one of the fundamental documents of the United Nations, along with its Charter, and it was the first text to establish universally the rights that belong to any human being. Nevertheless, it is not a treaty, therefore it does not create legal obligations for the members of the international community, but it has the function of expressing their shared values on the issue.

It consists of a Preamble and 30 articles, in which, besides recognizing all political, social, civil, cultural and economic rights, it offers provisions that are fundamental for migrants too. In particular, it ensures the right of free movement and residence within whatsoever state (art. 13(1)) and the right to leave a country and return to it (art. 13(2)). Moreover, the Declaration ensures the right to seek and enjoy asylum in another country because of persecution (art. 14(1)), except for the case of persecutions arising from non-political crimes or acts contrary to the purposes of the United Nations (art. 14(2)).

1.2 The International Covenant on Economic, Social and Cultural Rights and the International Covenant for Civil and Political Rights.

On 16 December 1966, with the aim of transforming the values of the Universal Declaration of Human Rights into binding obligations, the International Covenant on Economic, Social and Cultural Rights¹⁵⁸ and the International Covenant for Civil and Political Rights¹⁵⁹ were drafted and entered into force the following year. Among the many important rights enshrined, the former claims the right of peoples to self-determination (art. 1), the ban on discrimination (art. 2(2)), and supports the gender equality (art. 3), the right to work (art. 6), to social security (art. 9), to adequate standard

¹⁵⁸ UN, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (Accessed: 22/11/2018)

¹⁵⁹ UN, *International Covenant on Civil and Political Rights*, 16 December 1966. Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Accessed: 21/11/2018)

of living (art. 11) and education (art. 13). The other Covenant provides the right to life (art. 6), the freedom of thought, conscience, religion (art. 18), and association (art. 22). In addition, it enshrines the right to political participation (art. 25), to fair trial and impartiality of the judgment (art. 14). In addition, in article 28 the document establishes the creation of a Human Rights Committee, composed of nationals of the States Parties, who will be assisted by the UN Secretary General and will monitor compliance with the provisions of the Covenant.

A large number of provisions can be found in both Covenants, and the main difference between them is identifiable in the words used: The Covenant on Economic, Social and Cultural Rights wording of statements requires a more direct and urgent intervention in comparison with the more gradual actions that states are encouraged to fulfil in the wording of the Covenant on Civil and Political Rights.

As regards migrants' rights, article 12 of the Covenant on Civil and Political Rights establishes the right for everyone to move within the territory of a state if legally present, the freedom to choose the place for residence, and the right to freely decide to leave a country or come back to it, as claimed in the Universal Declaration of Human Rights. In addition, article 12(4) states that no one shall be arbitrarily deprived of the right to enter his own country of origin. Finally, the following article 13 claims that a foreigner may be expelled from the territory of a Member State only by a decision in accordance with the laws, while he is entitled to challenge the decision before a competent authority.

1.3 The Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (CAT).

The Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (CAT)¹⁶⁰ must be included in the list of the most important documents which protect the rights of migrants and of humanity in general. On 10 December 1984 the General Assembly of the UN adopted this Convention, which bans any form of torture

¹⁶⁰ UN, *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*, 10 December 1984. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (Accessed: 21/11/2018)

undertaken both by civilians and public officials or law enforcement personnel (art. 10(1)). It entered into force on 26 June 1987 and currently it has 165 States Parties and 83 signatories¹⁶¹.

This document requires States Parties to adopt a series of effective measures to ensure the prevention and the fight against torture, and to protect the physical and mental integrity of people deprived from their liberty. Moreover, an international control system is established: every four years, contracting states must report to the UN Commission Against Torture the measures they have taken to fulfil the obligations imposed by the Convention.

Article 3(1) of the CAT enshrines the ban to expel, return or extradite a person to a state where there are reasonable grounds for thinking he would be in danger of being tortured. The same article, in its second point, adds that, in determining such grounds, the competent authorities shall consider several aspects, among which the presence in the state concerned of a consistent pattern of human rights violations. This concept clearly reflects the abovementioned principle of non-refoulement, included in the Convention Relating to the Status of Refugees. Their close connection will be analysed in more detail in Chapter III.

1.4 The European Convention on Human Rights.

Even at European level, many documents were drafted in order to protect human rights. On 4 November 1950 the Council of Europe drew up the European Convention on Human Rights (ECHR), also known as the Convention of Rome¹⁶², which it drew on the inspiration of the Universal Declaration on Human Rights. As the latter, the European Convention was written after the Second World War, in order to establish the fundamental rights which shall no more be violated and to promote democracy. It entered into force

¹⁶¹ UN Treaty Collection, *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*, status as at: 16 February 2019. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en (Accessed: 17/02/2019)

¹⁶² Council of Europe, *European Convention on Human Rights*, cit.

on 3 September 1953 and firstly it was signed only by twelve states, while currently its parties are all 47 Council of Europe Member States.

This document is considered the central text on the European protection of fundamental rights since it is the sole instrument with a permanent jurisdiction mechanism which allows any person (individuals, Non-Governmental Organization or groups of people) to claim protection of their rights through the direct appeal to the European Court of Human Rights, based in Strasbourg.

In its articles, the Convention requires Member States to respect basically the same fundamental rights enshrined in the Universal Declaration on Human Rights, which are important for any human being and so for migrants too, such as the right to life (art. 2), the prohibition of torture (art. 3) and of slavery (art. 4). In addition, it supports the freedom of thought, conscience, religion (art. 9), expression (art. 10) and assembly or association (art. 11), with no kind of discrimination accepted (art. 14). Subsequently, the Convention was integrated and modified by 14 Additional Protocols. In particular, Protocol n. 4 is worth mentioning, since it enshrines the right of free movement (art. 2), and the prohibition of collective expulsion of aliens (art. 4).

1.5 The Charter of Fundamental Rights of the European Union.

Some of the abovementioned principles are included also in the Charter of Fundamental Rights of European Union¹⁶³, a text which contributes to the respect of human rights of both its members and third-countries nationals, as specified in its Preamble. The objective of the Charter is to set out the common values of the Members of the Union while respecting cultural differences, placing the individual at the heart of its activity, supporting the principles of democracy and the rule of law.

It was created on 2 October 2000 and entered into force on 1 December 2009, along with the Treaty of Lisbon. Its provisions are binding for its Parties.

The Charter sets out the principles which must be respected by the Union in the application of the Community law. It consists of 54 articles, divided in 7 Chapters and

¹⁶³ EU, *Charter of Fundamental Rights of European Union*, 7 December 2000. Available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (Accessed: 21/11/2018)

the titles of the first six represent the fundamental values of the Union: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Finally, the last Chapter includes the General Provisions.

First of all, among the principles that are worth noting in the first two Chapters, the Charter supports the prominence of the right to life along with a total ban of the death penalty, enlisted in article 2. It also supports the prohibition of torture and inhumane or degrading treatment or punishment (art. 4) and it requires the respect of the right to liberty (art. 6). Regarding workers, article 15 ensures the freedom to seek employment, the right of establishment and provision of services, that apply also to the nationals of third countries who have the authorization to work in a Member State and may thus enjoy the same rights as the citizens of the Union (article 15(3)). In addition, article 18 ensures the right to asylum with due respect to the provisions of the Geneva Convention, its 1967 Protocol, and the Treaty establishing the European Community. The following article 19 states the prohibition of removal, expulsion or extradition. In particular, it forbids collective expulsion or extradition to states in which there may be a risk for people being subjected to the death penalty, torture or other inhumane treatments. It is clear that this article reflects the principle of non-refoulement.

The last Chapters of the Charter protect equality rights, such as the non-discrimination principle (art. 21); the solidarity principles, such as workers' rights (art. 27) and health care (art. 35); and the rights of citizens, such as the right to vote (art. 40). Finally, the sixth Chapter enshrines the rights concerning justice, such as the right to an effective remedy and a fair trial (art. 47).

2. The non-refoulement principle in the jurisprudence of regional and international Courts on human rights.

As said in the first Chapter, the non-refoulement principle is one of the cornerstones of international and customary law, governing search and rescue operations and asylum procedures. It is established by article 33 of the 1951 Refugee Convention.

According to human rights, it is closely connected to the prohibition of torture and other cruel, inhumane and degrading treatments or punishments, since it is based on the need

to protect migrants from the possibility of undergoing such actions in a country other than the one in which they arrived. However, under international human rights law, the scope of the principle appears broader than that contained in international refugee law.

First of all, the CAT in article 3 forbids states to expel, return or extradite a person where there are real possibilities that he would face torture. The three verbs used, refer to three different situations: expulsion refers to the transfer of people who legally entered the state; return means the transfer of people who entered illegally; extradition is the act of moving a person to a state where he has been accused of a crime. From this statement, it is clear that the principle must be applied to every single individual, regardless of his status. This is an upgrade of article 33 of the 1951 Refugee Convention, to which the CAT inspires, since the former protects only refugees and asylum seekers. Moreover, the Refugee Convention excludes the application of the non-refoulement principle whereas the refugee may represent a danger for the security of the country and its community (article 33(2)). On the contrary, article 2(2) of the CAT adds that it is applicable regardless of any circumstances,

“whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹⁶⁴”

Moreover, the principle is enshrined in various European agreements protecting human rights. For instance, the ECHR establishes the prohibition of torture or degrading treatments, stating that

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.¹⁶⁵”

The application of the non-refoulement principle according to article 3 of the ECHR has been clarified and extended thanks to the jurisprudence of the European Court of Human Rights, which contributed to the creation of a “complementary protection” to the Geneva Convention. In fact, its jurisprudence extended the non-refoulement principle to all non-nationals and obliged each Member State to protect them from possible violations from

¹⁶⁴ UN, *Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment*, cit., article 2(2).

¹⁶⁵ ECHR, article 3.

other states. In order to define this safeguard procedure, the legal experts Gérard Cohen-Jonathan and Frédéric Sudre, coined the term protection *par ricochet*¹⁶⁶, following the *Soering v. The United Kingdom* case¹⁶⁷. Another significant example of this protection was enshrined in the *D. v. United Kingdom* case¹⁶⁸, where the Court claimed that in exercising their power to expel foreigners, states must take into account article 3 of the ECHR, which consecrates one of the fundamental values of democratic societies¹⁶⁹. This is the reason why the Court reiterated in its previous judgments concerning extradition, expulsion or return of persons to third countries, that article 3 forbids in absolute terms torture or degrading treatments and that its provisions must be applied even if the person committed reprehensible acts. Otherwise, the state would behave in a manner incompatible with the values of the Convention. Despite the absence of an explicit mention in the wording of article 3, such extradition or return would clearly be contrary to the spirit of the article itself¹⁷⁰.

Therefore, “reflection” protection aims at extending the application field of the ECHR, and at protecting migrants also in a non-contracting state. It clearly allows no exception, even in emergency situations which may threaten national security¹⁷¹.

Therefore, considering their absolute nature without any exceptions and their extension to all individuals, irrespective of citizenships, nationality or migration status, it is worth

¹⁶⁶ Francesco CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione Europea*, cit., p. 103 et seq.

¹⁶⁷ ECtHR, *Soering v. The United Kingdom*, Application No 14038/88, 7 July 1989. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-soering-v-united-kingdom-application-no-1403888-7-july-1989> (Accessed: 11/12/2018)

¹⁶⁸ ECtHR, *D. v. United Kingdom*, Application No 30240/96, 7 May 1997. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-d-v-united-kingdom-application-no-3024096-2-may-1997> (Accessed: 01/02/2019)

¹⁶⁹ Nicoletta PARISI, Dino RINOLDI, *Confini d'Europa, stato di diritto, diritti dell'uomo: gerarchia e bilanciamento tra diritti fondamentali con particolare riguardo alla condizione del migrante*. At: Lauso ZAGATO, Sara DE VIDO, *Il divieto di tortura e altri comportamenti inumani e degradanti nelle migrazioni*. Padova: CEDAM, 2012, pp. 29-30.

¹⁷⁰ *Ibidem*.

¹⁷¹ The absolute non-derogable nature of article 3 was confirmed in the ECtHR's judgment about the case *Chahal v. The United Kingdom*, n. 22414/93, 1996. On the contrary, some European governments support the thesis according to which, despite being the prohibition of torture a mandatory obligation, the non-refoulement principle application should be decided on the basis of the necessity to safeguard collective security. Antonio MARCHESI, *La proibizione della tortura all'inizio del nuovo millennio*. At: Lauso ZAGATO, Simona PINTON, *La tortura nel nuovo millennio: la reazione del diritto*, Milano: CEDAM, 2010, p. 29.

noting that both the mentioned articles of CAT and ECHR have a wider scope than article 33 of the Refugee Convention, whose field of application is more limited.

Another distinction can be made concerning the nature of the risk. In the Refugee Convention the non-refoulement principle is only linked to the threat of persecution; in the human rights field it is extended to any situation where there could be the risk of a person being subjected to torture or inhumane treatment or punishment. Again, the international humanitarian law covers a wider range of situations.

At international level, the non-refoulement principle is also enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)¹⁷², which in article 16 establishes that a state shall not return or surrender a person to another state where he could risk enforced disappearance.

At regional level, it is present in the Inter-American Convention on the Prevention of Torture, which, in article 2 adds more details about torture with respect to the CAT. Indeed, it includes methods

“intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish¹⁷³”.

Moreover, the non-refoulement principle linked to the protection of human rights is enshrined in the American Convention on Human Rights¹⁷⁴ (article 5) and in the African Charter on Human and Peoples’ Rights¹⁷⁵ (article 5).

Courts and international human rights bodies have associated the principle to various human rights violations. As a result, not only is it linked to the prohibition of torture, but

¹⁷² UN, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006. Available at: <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx> (Accessed: 30/11/2018)

¹⁷³ Organization of American States, *Inter-American Convention on the Prevention of Torture*, 28 February 1987, article 2. Available at: <http://www.oas.org/juridico/english/treaties/a-51.html> (Accessed: 30/11/2018)

¹⁷⁴ Organization of American States, *American Convention on Human Rights*, 22 November 1969. Available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (Accessed: 30/11/2018)

¹⁷⁵ African Commission on Human and Peoples’ Rights, *African Charter on Human and Peoples’ Rights (Banjul Charter)*, 27 June 1981. Available at: <http://www.achpr.org/instruments/achpr/> (Accessed: 12/12/2018)

also to the right of fair trial¹⁷⁶, the prohibition of gender-based violence¹⁷⁷, female gender mutilation¹⁷⁸ or prolonged solitary confinement¹⁷⁹.

Moreover, some violations of economic, social and cultural rights have been interpreted by Courts as failures to comply with the non-refoulement principle, since they violated the right to life or freedom from cruel actions: for instance, degrading living conditions¹⁸⁰ or lack of medical treatment¹⁸¹.

Nevertheless, there are some cases in which returns are legally permitted. With regard to this, the UN High Commissioner for Human Rights analysed the meaning of “protection” of migrants and established its criteria on the mechanisms that states should adopt about returns¹⁸². It states that in the case of migrants not needing protection, return might still be a non-desirable option according to individual considerations: states should develop discretionary mechanisms in order to analyse every specific individual circumstance. For instance, in line with this statement, Italy forbids return to pregnant women and mothers of children under six months old¹⁸³. Moreover, even when returns are legally possible, this should not be the preferred governance option. States should consider regularization schemes and improve legal migration pathways as alternatives to returns, for instance educational or labour pathways which can promote integration.

¹⁷⁶ ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09, 17 January 2012, paragraphs 235, 258. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-othman-abu-qatada-v-united-kingdom-application-no-813909> (Accessed: 29/11/2018)

¹⁷⁷ UN Committee Against Torture (CAT), *Eveline Njamba and Kathy Balikosa v. Sweden*, CAT/C/44/D/322/2007, 3 June 2010. Available at: http://www.bayefsky.com/docs.php/area/Jurisprudence/treaty/cat/opt/0/state/166/node/4/filename/sweden_t5_cat_322_2007 (Accessed: 29/11/2018)

¹⁷⁸ Human Rights Committee, *Kaba v. Canada*, CCPR/C/98/D/1465/2006, 21 May 2010, par. 10.1. Available at: <https://www.refworld.org/cases,HRC,4c189a362.html> (Accessed: 29/11/2018)

¹⁷⁹ Human Rights Committee, CCPR General Comment No. 20: article 7 (*Prohibition of torture, or Other Cruel, Inhumane or Degrading Treatment or Punishment*), par. 6, 10 March 1992. Available at: <https://www.refworld.org/docid/453883fb0.html> (Accessed: 29/11/2018)

¹⁸⁰ ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609> (Accessed: 29/11/2018)

¹⁸¹ UN Human Rights Committee, *C. v. Australia*, Communication No. 900/1999, 13 November 2002. Available at: <https://www.refworld.org/cases,HRC,3f588ef00.html> (Accessed: 29/11/2018)

¹⁸² OHCHR, *What do we mean by “protection” for migrants?* Available at: <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/Protection.pdf> (Accessed: 30/11/2018)

¹⁸³ Italy, Legislative Decree 286/1998, Article 19(1).

Regarding governments attitudes towards torture practices, after September 2001 the worldwide fear of terrorist attacks and the need to improve controls created the conditions for a possible change in the assessment of these practices¹⁸⁴. The fact that torture was unanimously condemned and forbidden has never been questioned, until, after the attack on the Twin Towers, an attempt was made by the United States to weaken its probation and allow some interrogation practices justified by the imperative to fight terrorists. Again, as in the abovementioned measures taken by states with the aim of fighting illegal immigration, we face the questionable contraposition between safeguarding human rights and national security, which frequently requires accurate balancing.

It is worth noting that after that date nothing changed from the point of view of the contractual framework, since no state withdrew from international agreements in the field of human rights and prohibition of torture. In addition, no amendments to these agreements have been proposed either¹⁸⁵. Also, from the point of view of the customary law, the idea to introduce torture as a legal procedure has not been accepted by the international community.

Nevertheless, some changes occurred in relation to the interpretation of torture. As the CAT asserts in article 1, torture is any act which causes serious physical and mental pain, with the purpose of obtaining information or confession, punishing, intimidating or coercing, with consensus or acquiescence of a public official. Given this definition, governments advanced different interpretations about the concept of seriousness of suffering and about mental pain: in fact, the task of measuring human suffering is a very complex issue. Moreover, the 1984 Convention does not provide a clear definition of the acts of cruel, inhuman or degrading treatment or punishment, the identification of which must be based on international and domestic practice, besides international and European Courts' jurisprudence¹⁸⁶. It is precisely on this margin of discretion that the United States based their attitude after 11 September, when the President Bush authorized his public officials to be more aggressive against suspected terrorists, resizing the prohibition with an extremely high pain threshold for torture to be defined. Nevertheless, these practices ended with the Obama administration.

¹⁸⁴ Antonio MARCHESI, *La proibizione della tortura all'inizio del nuovo millennio*, cit., p.4.

¹⁸⁵ Antonio MARCHESI, *La proibizione della tortura all'inizio del nuovo millennio*, cit., p. 11.

¹⁸⁶ Nicoletta PARISI, Dino RINOLDI, *Confini d'Europa, stato di diritto, diritti dell'uomo*, cit., p. 3.

In Italy too, there have been several cases in which article 3 of the ECHR have been violated because of a hostile attitude towards suspected terrorists and irregular migrants. The Strasbourg Court issued judgments on the expulsion to Tunisia (where the risk of cruel treatment was clearly declared) of some non-European citizens convicted of belonging to terroristic groups¹⁸⁷, besides the event of migrants returned to Libya, involved in the Hirsi and Jamaa case which will be analysed in the next paragraph.

Therefore, it is possible to assert that violations of the prohibition of torture and non-refoulement principle are sometimes undertaken by states in context of emergency situations, most of all linked to terrorism and illegal migration, current threats that encourage the justification and dilution of the severity of certain treatments¹⁸⁸.

Therefore, it is not possible to affirm that after September 2001 states “returned” to torture, since all states continued to support its total prohibition, however the real problem is inherent in the rules and norms which aim at its effective elimination, since they can be circumvented. Both the notion of inhuman and degrading treatment and the threshold of pain provide some room for oscillation in the interpretation, and represent a point of weakness, as subjective elements. Consequently, despite the *opinio juris* accepted worldwide, torture is a concept exposed to various tensions, from attempts to restrict its meaning to the firm belief that no exception is allowed for its “direct” field of application but not for the “indirect”, under the non-refoulement principle.

It is not possible to talk about a return to accepted torture practices; at the same time, current practice proves that we are still far from its complete elimination.

2.1 The case *Hirsi Jamaa and Others v. Italy*.

The case law that, more than any other, has helped to expand the scope of application of the non-refoulement principle is considered to be the case *Hirsi Jamaa and Others v. Italy*¹⁸⁹. The present case refers to the interception made by the Italian Revenue Police

¹⁸⁷ See *Mannai, Toumi, Trablesi and Ben Khemais v. Italy* cases.

¹⁸⁸ Nicoletta PARISI, Dino RINOLDI, *Confini d'Europa, stato di diritto, diritti dell'uomo*, cit., p. 13.

¹⁸⁹ ECtHR, *Case of Hirsi Jamaa and Others v. Italy*, Application No. 27765/09 (Hirsi), 23 February 2012. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509> (Accessed: 20/10/2018)

and Coast Guard of three boats loaded with about 200 migrants, who sailed from Libya and were heading for Italy on 6 May 2009. They were in international waters, 35 nautical miles away from Lampedusa, therefore -as previously explained - in the Maltese Search and Rescue Region of responsibility. When intercepted, the occupants of the boats were transferred to Italian military ships and returned to Tripoli. This kind of operation was supported by the Italian Minister of Internal Affairs as a way of fighting clandestine immigration.

On November 2009 a complaint to the European Court of Human Rights (ECtHR) was filed by some humanitarian workers for the Italian Council of Refugees, supported by 24 Somali and Eritrean citizens who were onboard of the intercepted boats. The case was referred to the Grand Chamber of the ECtHR.

According to the general principles of law, the state jurisdiction is essentially territorial, however, whenever a state exercises authority over an individual through its agents operating outside its territory, it is possible to speak of extra-territorial exercise of jurisdiction¹⁹⁰. Moreover, when a vessel sails international waters it is under the exclusive jurisdiction of its own flag state. Therefore, in the present case, Italy exercised its full jurisdiction *de jure* and *de facto* over migrants landed on Italian vessels and brought back to Libya.

Moreover, article 3 of the European Convention on Human Rights states the prohibition of torture and inhuman treatment and the respect of the non-refoulement principle. The Court recognized the violation by Italy of this article since Libya offered no guarantee of treatment according to the international standards for asylum seekers and refugees, and exposed them to the risk of being repatriated by the Libyan authorities to the states of origin, where the applicants claimed to be subject to persecution.

In addition, article 13 of the ECHR requires an effective remedy before a national authority for everyone whose rights set in the Convention are violated. Applying this norm to the case, the Court stated its violation by Italy since the state did not allow the applicants to apply for asylum. Finally, article 4 of the Additional Protocol n. 4 to the Convention affirms the ban on collective expulsion. The Court recognized the violation of this article.

¹⁹⁰ *Case of Hirsi Jamaa and Others v. Italy*, par. 74.

The Court reiterated that jurisdiction of states, although in exceptional circumstances, is not limited to its territory, and when authority and control are exercised, then there must also be responsibility. On 23 February 2012, the Court condemned the Italian State.

This represented the first case in which the European Court of Human Rights formulated a judgement on interception at sea and it provides a relevant breakthrough between the concept of jurisdiction in the ECHR and the extraterritorial application of the principle of non-refoulement.

3. Violations of migrants' human rights in the external policies of the European Union.

As mentioned in Chapter I, the European Union as a whole, or some of its Member States alone, adopted bilateral agreements with third countries, such as Turkey and Libya, in the attempt to improve the management of migration flows. The EU-Turkey Statement and the Memorandum of Understanding between Italy and Libya are documents of great relevance, as well as sources of great debates. Indeed, the process of externalization of the migration policies undertaken by the Union, not only appears to be an attempt to unload responsibilities to other countries, but it also neglects the importance of migrants' human rights. Through the analysis of the provisions of both these documents, it is possible to reveal some violations of fundamental human rights.

In addition, in two judgments of two cases which involved migrants and countries of the Union, a different approach regarding human rights respect may be highlighted according to whether the events in question took place within or without European borders.

Let's firstly analyse the two bilateral agreements, and then these two famous judgments.

3.1 Bilateral agreements: The EU-Turkey Statement and the Memorandum of Understanding between Italy and Libya.

The EU-Turkey Statement was established on a premise: that Turkey was a safe place for migrants, as required by international law and the aforementioned non-refoulement principle. Nevertheless, this resulted not to be perfectly true, since Turkey has not always guaranteed the minimum standards for migrants, as has been recognized several times by Greece's Asylum Appeals Committees¹⁹¹ and by direct testimonies of migrants.

Concerning this issue, in 2015 and 2016 the NGO Amnesty International conducted some research in Turkey showing that in many cases migrants had been forcibly returned to their country of origin, since the Turkish asylum system was not able to deal with the huge number of applications presented. In addition, some evidence proved that migrants in Turkey were subjected to arbitrary detention, denial to legal representation and medical care. These factors, besides denying Turkey the role of a safe country, represent violations of international law.

In addition, another serious consequence of the Statement was that the majority of migrants has been left in a kind of limbo, blocked on the Greek islands for a very long time waiting to be returned to Turkey. On 14 February 2017 Amnesty International published the report titled "Greece: a blueprint for despair. Human rights impact of the EU-Turkey deal¹⁹²", where it analysed all the outcomes achieved after almost a year of implementation of the agreement provisions, and gave its considerations about it.

First of all, it blamed the EU for having left thousands of migrants in overcrowded hotspots on the Greek islands, in particular Lesbos, Samos and Kos, for the long time required for asylum procedures, in wretched and dangerous conditions. Here many gaps in a range of different areas occurred, such as delays in identification processes and lack of provision of information. The camps where migrants were temporarily hosted before the deal, under the new provisions were transformed into detention facilities, where

¹⁹¹ *Greek Asylum Appeals Committees Say Turkey Unsafe for Refugees*, The National Herald, 27 October 2017. Available at: <https://www.thenationalherald.com/179573/greek-asylum-appeals-committees-say-turkey-unsafe-refugees/> (Accessed: 24/11/2018)

¹⁹² Amnesty International, *Greece: a blueprint for despair. Human rights impact of the EU-Turkey deal*, 14 February 2017. Available at: <https://www.amnesty.org/en/documents/eur25/5664/2017/en/> (Accessed: 23/11/2018)

migrants were not provided with interpreters nor legal assistance. This corresponds to arbitrary detention, which, as said before, is contrary to international law.

As a response, the UNHCR suspended its activities in the camps, in line with its policy opposing mandatory detention¹⁹³, and so did Médecins Sans Frontières, as it did not want to show complicity with that system which it considered unfair and inhumane¹⁹⁴. Subsequently, also Save The Children and Oxfam ceased their operations in the area.

Amnesty International reported testimonials collected in April 2016 within a detention centre: many migrants denounced poor food provisions, lack of medical care and shortages of medicines. In addition, there have been many cases of men, women, and children with psychological traumas because of the impact of these inhumane experiences. This has been documented also by the Human Rights Watch¹⁹⁵, which in May and June 2017 analysed the mental health among migrants in the camps: the results revealed a high rate of depression, anxiety, and psychosis. Moreover, the recorded rate of suicide attempts and incidents of self-harm drastically increased. These mental conditions were surely influenced by the difficulties suffered in their country of origin, the trauma of war and forced abandonment of their homes, but worsened because of the impact of the circumstances to which they were forced: harsh conditions, sense of insecurity, lack of information, detention with no explanation, feeling of hopelessness.

Most of the migrants have been brought back to Turkey without access to asylum procedures or without having the chance to challenge the decision of their return, again in violation of international law.

As a protest, in 2016 Médecins Sans Frontières rejected all European funds and declared it will no longer accept any money from the EU.

¹⁹³ UNHCR, *UNHCR redefines role in Greece as EU-Turkey deal comes into effect*, 22 March 2016. Available at: <https://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html> (Accessed: 24/11/2018)

¹⁹⁴ Médecins Sans Frontières, *Greece: MSF ends activities inside the Lesvos hotspot*, 22 March 2016. Available at: <https://www.msf.org/greece-msf-ends-activities-inside-lesvos-hotspot> (Accessed: 24/11/2018)

¹⁹⁵ Human Rights Watch, *EU/Greece: Asylum Seekers' Silent Mental Health Crisis*, 12 July 2017. Available at: <https://www.hrw.org/news/2017/07/12/eu/greece-asylum-seekers-silent-mental-health-crisis> (Accessed: 24/11/2018)

The EU-Turkey Statement has given rise to deep concerns also to the chief of the UN High Commissioner for Human Rights¹⁹⁶. In particular, he expressed his worries about forced returns which contrast with required assurances about individual assessments and risk creating a collective expulsion, banned by international law. Moreover, the deal neglects human rights since, in the analysis of asylum applications under the EU-Turkey Statement, Turkey is not required to take into consideration situations in which migrants need particular protection: this is the case of children, victims of violence, people with disabilities and many others. The UN Human Rights chief called for the serious need to analyse individual requests with great care, carry out returns in the respect of migrants' human rights and dignity, with no coercion, no use of force or other abuses. Finally, he urged European states to implement the recommendations made by the UN, some NGOs, and other experts, concerning the creation of legal channels of entry, respecting those principles that regulate the international community, since

“if the EU starts to circumvent international law, there could be a deeply problematic knock-on effect in other parts of the world¹⁹⁷.”

The Memorandum of Understanding might recall the wording of the EU-Turkey Statement, since, as previously said, they both aim at outsourcing border controls on a country which represents a fundamental gateway to Europe. Indeed, the two documents have some common ideas and objectives, but it is possible to say that the Memorandum is even worse from the human rights point of view.

First of all, the Memorandum, unlike the EU-Turkey deal, makes no provision for resettlement. This depends on the fact that, as said before, legal migrants and refugees are not even taken into consideration and the parties seem to ignore the possible different status of people, assimilating all of them under the label “illegal migrants”.

Secondly, the situation from the point of view of the respect of human rights is definitely more critical in Libya than in Turkey, as described in the last paragraph of the previous

¹⁹⁶ OHCHR, *UN rights chief expresses serious concerns over EU-Turkey agreement*, 24 March 2016. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18531&LangID=E> (Accessed: 24/11/2018)

¹⁹⁷ *Ibidem*.

chapter. Indeed, in Libya there is no framework that guarantees respect of migrants' rights, international protection and non-refoulement principle implementation, and this contributes to arbitrariness and insecurity. It is true that article 5 of the Memorandum commits states to respecting international obligations and human rights agreements the parties are signatories of, but this results in an insufficient provision since Libya has refused to sign many fundamental treaties about human rights, and numerous reports certify their violations in the country. On the other hand, notwithstanding Italy's awareness of the situation, not only are there no requests for human rights implementation or recognition of refugee status, but the document explicitly identifies voluntary and forcible returns as a main objective. These unavoidably appear as acts of refoulement, banned by international law, for which Italy has already been condemned, but seems not to care. In fact, even if returns were implemented by Libya, Italy's assistance and consensus may involve its responsibility¹⁹⁸. The deal is thus contrary to the European Convention on Human Rights, which is mandatory for all Member States. Moreover, it is important to remember that it does not matter if Libya has not signed the 1951 Refugee Convention, since the non-refoulement principle is always applicable since it is a customary international law. Moreover, it is embodied in other treaties ratified by the country, such as the CAT and the 1966 International Covenant on Civil and Political Rights.

In addition, while the EU-Turkey deal was accompanied by The European Facility for Refugees in Turkey¹⁹⁹, where all funding destinations were established, here there is little clarity about the origin and destination of the funding Italy should provide. Article 4 declares that the country should finance the project without any additional burden for its budget, making use of EU funds. Hence, the main source would probably be the €200 million that Europe allocated in 2017 to the Italian Fund for Africa²⁰⁰, however it is not clearly stated. Moreover, the Italian Foreign Minister declared the intention to use those funds to stop irregular migrations and reinforce third-states borders, thus there is no

¹⁹⁸ ILC, *Responsibility of States for Internationally Wrongful Acts*, August 2001, Article 16. Available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (Accessed: 25/11/2018)

¹⁹⁹ European Commission, *The European Facility for Refugees in Turkey*. Available at: https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en (Accessed: 25/11/2018)

²⁰⁰ Italian Minister for Foreign Affairs and International Cooperation, *Fund for Africa*, 1 February 2017. Available at: http://www.esteri.it/mae/resource/doc/2017/02/decreto_africa_0.pdf (Accessed: 25/11/2018)

mention of those development programs required by article 1(B), article 2(4), and article 2(6).

The Memorandum has raised numerous debates. First of all, few days after the adoption of the document, the ASGI showed its total opposition considering it as “shameful, anti-democratic and against international law”²⁰¹. They asked Europe to interrupt policies based on agreements with third countries which aim at hindering and blocking the passage of refugees, exploiting the issue of safeguarding their lives, instead disguising the real purpose of a brutal and illegitimate border closure. Moreover, they asked the Italian Government to withdraw the agreement, interrupt the repatriation of migrants toward countries which do not respect their human rights, and invited the NGOs to oppose the use of European funds for closing borders.

Doubts about the legitimacy of the document have been also raised according to Italian constitutional law: article 80 of the Italian Constitution²⁰² requires the ratification by Parliament for all documents that have a political nature and imply financing by the state. Nevertheless, the Memorandum has never received any approval by Parliament. Moreover, in February 2018 a group of Italian deputies, members of the ASGI, filed a complaint with the Italian Institutional Court requesting the annulment of the agreement²⁰³. In July 2018 it was rejected: The Court stated that in order to be considered, the complaint should be requested by the parliamentary assembly as a whole, and not by individual parliamentarians²⁰⁴.

Moreover, focusing on vocabulary, the Memorandum always refers to clandestine or illegal migrants: this seems a political choice which aims at developing a rhetoric based on a single category, the one of those persons who cannot enter Europe. Indeed, since

²⁰¹ ASGI, *ASGI: the EU and Italy de facto violate the principle of non-refoulement*, 6 February 2017. Available at: <http://www.asgi.it/english/libya-eu-italy-asylum-migration/> (Accessed: 25/11/2018)

²⁰² Republic Senate, *Constitution of the Italian Republic*, 1 January 1948, article 80. Available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (Accessed: 25/11/2018)

²⁰³ ASGI, *Mancata ratifica parlamentare del memorandum Italia-Libia: al via il ricorso alla Corte Costituzionale*, 28 February 2018. Available at: <https://www.asgi.it/asilo-e-protezione-internazionale/mancata-ratifica-parlamento-memorandum-italia-libia-ricorso-corte-costituzionale/> (Accessed: 27/11/2018)

²⁰⁴ *Accordo Italia-Libia, la consulta respinge il ricorso di Civati*, Il Giornale, 20 July 2018. Available at: <http://www.ilgiornale.it/news/politica/accordo-italia-libia-consulta-respinge-ricorso-civati-1555627.html> (Accessed: 27/11/2018)

flows from Libya are extremely mixed²⁰⁵ the individual analysis and the outsourcing of asylum management would be fundamental. However, the issue concerns a country, Libya, that does not recognize the right of asylum, nor has the necessary abilities and experiences to analyse the international protection claims. As a consequence, the necessary border controls are not carried out, and this entails a violation of human rights. Another relevant issue is represented by the reception centres Italy has promised to finance according to article 2(2). The funding of the centres, along with the training of Libyan personnel, and medical assistance are ensured, while there is no provision ensuring the respect of human rights, neither is there any reference to accepting the interventions of people and bodies which would help to avoid violations, such as lawyers, NGOs, or International Organizations (except for those which intend to carry out repatriations, as established by article 2(5)).

Currently, despite the strong criticisms of it, there are no signs of suspension of the agreement.

3.2 Different approaches of jurisprudence concerning migrants: The case *X. and X. v. Belgium* and the case *Al Chodor and Others*.

“Bifurcation of people, bifurcation of law” (as the title of the Thomas Spijkerboer’s article reads²⁰⁶) refers to the bifurcation of human movements subsequent to the externalization of migration policies and the resulting tendency to apply certain laws and human rights standards only to specific people. According to this thesis, the world is in the process of being divided into two areas: the first (equivalent to the Americas, Europe and the Far East) can be called the “Global North”, the second (the rest of the world), the “Global South”. Within both of them people can freely move and transfer, but the main difference is that from the North it is easy to move towards the South, and visas are almost always granted, while the reverse is not the case. From the South, movements towards the North

²⁰⁵ UNHCR, *Libya Factsheet*, April 2017. Available at: <http://reporting.unhcr.org/sites/default/files/UNHCR%20Libya%20Fact%20Sheet%20-%20April%202017.pdf> (Accessed: 25/11/2018)

²⁰⁶ Thomas SPIJKERBOER, *Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice*, cit.

are more difficult and subjected to permission and far more specific criteria. For this reason, it is possible to talk about a bifurcation of human movements.

As a consequence of this tendency to divide spaces and people according to different criteria, at European level there have been juridical cases examined by the European Court of Justice (ECJ) which have demonstrated the inclination to apply European laws within its borders and not outside. Using the same words as Spijkerboer's article, it seems that

“Excluded people are not merely to be excluded from European territory, but also from European law²⁰⁷.”

One of the main relevant cases, clear example of this issue, is the so-called *X. and X. v. Belgium* case. The applicant of this proceeding is a Syrian family, consisting of a married couple and three children. On 12 October 2016, on the basis of article 25(1)(a) of the Visa Code²⁰⁸, they asked for visas with limited territorial validity at the Belgian Embassy in Lebanon. They clearly admitted that their objective was to leave Aleppo, a war-torn city, and apply for asylum once in Belgium.

Nevertheless, Belgium rejected their applications. The Belgium Immigration Office motivated the rejection declaring that the family intention was to stay in Belgium longer than the Visa Code permits.

The Syrian family appealed to the Council for Alien Law Litigation. They invoked the respect of article 4 of the Charter of Fundamental Rights of the EU (CFR) which concerns the prohibition of torture or inhuman or degrading treatment or punishment, article 18 which guarantees the right of asylum, and article 33 of the Geneva Convention with the non-refoulement principle.

The *Conseil du Contentieux des Étrangers* (Council for Asylum and Immigration Proceedings) considered article 25(1) of the Visa Code as applicable, but due to the opposition by the media and some Belgian politicians, referred the question on the

²⁰⁷ Thomas SPIJKERBOER, *Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice*, cit., 216.

²⁰⁸ EU, *Visa Code*, Regulation (EC) No 810/2009, 13 July 2009. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0810&from=EN> (Accessed: 02/12/2018)

interpretation of the Visa Code to the European Court of Justice. The Court accepted the request for a preliminary ruling under the urgent preliminary ruling procedure, therefore the case was immediately examined by the Grand Chamber²⁰⁹.

The Court found that the lodged visas which had an intent to apply for asylum in a Member States did not conform to the EU law. According to article 62 of the EC Treaty²¹⁰, the Visa Code provisions are applicable only for visas regarding stays no more than 3 months long. In addition, even article 1 of the Code states that its provisions apply to stays of 90 days at the most. Since there are no measures adopted by the EU that regulate visas for longer stays, the ECJ stated that the applications fell outside the scope of the Code, and thus solely fell within the national law. As a consequence, the provisions of the Charter could not apply to the situation either. Hence, the national authority was responsible for deciding whether article 3 of the ECHR could bind the state to issue the humanitarian visas or not.

The judgment is also in line with the Asylum Procedures Directive which excludes (art. 3(2)) the authorization to third-country nationals to apply for asylum at diplomatic posts: indeed, this would allow third country nationals to seek asylum through the representations of Member States in another country. This is contrary to the Dublin III Regulation, according to which each state is solely responsible for deciding about asylum requests and the decision shall occur on its own territory. The judgment of the Court was issued on 7 March 2017.

Now it is not possible to challenge the rules of application of the Visa Code. However, the issue remains open for debate from the point of view of human rights.

The main question is whether states are obliged to comply with article 4 of the CFR when applicants risk being exposed to torture, inhumane conditions and cruel treatment and punishment in their country of origin (and this was the case, since Syria was devastated by civil war). It is settled case law that states have the sovereign right to autonomously decide about entries and residence of third-country nationals. However, the family explicitly referred to have suffered situations of violence in Aleppo, and also to be at serious risk of

²⁰⁹ Sara DE VIDO, *Migrants' rights in the jurisprudence of the European Court of Justice*, Eastern Mediterranean Regional Training Partnership. Available at: <https://eastmedproject.eu>. (Accessed: 07/01/2019)

²¹⁰ EU, *Treaty establishing the European Community*, 24 December 2012. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12002E/TXT&from=EN> (Accessed: 02/12/2018)

persecution for religious reasons, since they were Orthodox Christians. Thus, returning these people to their city of origin represented a violation of the non-refoulement principle.

Furthermore, the territorial scope is not free from controversy: is article 3 applicable outside a Member State's territory? In fact, in this case the visa application was made in Lebanon, while jurisdiction is mainly territorial. However, human rights do not stop at the borders and jurisdiction extension has been discussed in numerous juridical cases. A clear example is the *Hirsi Jamaa and Others v. Italy* case previously analysed, which focused attention on the extraterritorial responsibilities of the state. In fact, the Court considered the jurisdiction based on a functional notion, considering both *de jure* and *de facto* control (by the Italian ships, in that case), which in the end made Italy responsible. The ECJ Advocate General Mengozzi delivered his opinion on the *X and X v. Belgium* case on 7 February 2017, hence before the judgment of the Court. He was convinced that the respect for the right protected by the abovementioned article 4 of the CFR implied the existence of a positive obligation on the part of Member States that must require them to issue a visa with limited territorial validity where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons seeking international protection to torture or inhuman treatment, which is prohibited by that article. Moreover, he argued that besides asking for visas, there were not many other possibilities for the Syrian family. Since they could no longer stay in Syria, the alternatives would have been to try the dangerous crossing of the Mediterranean Sea aboard some dinghies driven by smugglers, or resigning themselves to becoming illegal migrants in Lebanon with no international protection, running the risk of being returned to Aleppo. Paradoxically, if the applicants had risked their lives entering illegally in the EU, their applications would have been accepted. According to his opinion, the discretion that the Visa Code leaves to the states regarding the delivering of humanitarian visas, should always be limited by article 4 and by the non-refoulement principle in order to comply with humanitarian law. This opinion received the support of the NGO European Council on Refugees and Exiles, but the opposition of the ECJ.

The Belgian government replied to Mengozzi and raised the issue of the numerous applications that could be presented once a similar argument is accepted, but he denied the idea that the Member States would be necessarily overwhelmed by an uncontrolled

flow of applications on the basis of the use of the Visa Code. For instance, in 2015 the Belgian authorities granted numerous visas to Syrian nationals of Christian faith without experiencing a massive flux of applications. Moreover, Mengozzi's proposal was in line with the fight against smuggling and trafficking of human being, and supported the principle of solidarity and fair sharing of responsibility.

The ECJ with this case would have had the opportunity to establish clear standards about humanitarian visas that could provide international protection, however it preferred to adopt a conservative approach and let the national law deal with the issue.

The EU has always claimed the will to undertake and fight the smuggling of migrants, to reduce the number of deaths at sea and on the migratory routes, and the need of legal channels of entry. Therefore, the expectations on a judgment about states' obligations with respect to protected entries were high and fomented by Advocate General Mengozzi's considerations. Nevertheless, these expectations have been unfulfilled by the judgment of the Court which, despite being acceptable under the application of EU law, does not give any relevance to the complex humanitarian issue on the background.

The entries of migrants asking for international protection should be regulated by the European legislation and should not depend on a judgment. Nevertheless, in the absence of the former, the latter would be of fundamental importance, at least for highlight the lacks in the legislation with respect to the issue of migration.²¹¹

In addition, the juridical case reaffirms the paradox according to which migrants need to reach the territory of the state in order to lodge the asylum application, while the EU, as we have seen, is making it increasingly difficult to enter and stay within its borders.

The case *Al Chodor and Others* concerns the application of the Dublin III Regulation within European Union.

Al Chodor is the surname of an Iraqi family of Kurdish ethnicity who, in March 2015, travelled via Turkey to Greece and arrived in Hungary, where they were stopped by the police, who took their fingerprints. The following day, the police brought them to a refugee camp. Subsequently, they decided to leave the camp and head towards Germany in order to join some family members, but on the way, in the Czech Republic, they were

²¹¹ Chiara FAVILLI, *Visti umanitari e protezione internazionale: così vicini così lontani*. At: DUDI, 2/2017, p.553.

stopped by the police. After some checks and interviews, policemen became aware of the fact that the family had made an asylum application in Hungary, still pending. The family did not have any residence permit nor accommodation in the Czech Republic, therefore the police considered there was a serious risk of absconding. For this reason, they were detained according to article 28(2) of the Dublin III Regulation, which allows detention when there is a risk of absconding, in order to secure transfer procedures. Moreover, according to the police, this measure was perfectly legitimated also by Czech national law²¹².

The family appealed against their detention before a Regional Court. Its judgment declared the detention unlawful since Czech law did not provide for objective criteria about the risk of absconding. Against this judgment, the Czech police appealed to the Supreme Administrative Court and called for a preliminary ruling. The authorities argued that the lack of specific criteria in the national law could not by itself determine the inapplicability of the provisions of the Dublin III Regulation, which are directly applicable to Member States. Indeed, article 28(2) requires the respect of three conditions: the individual assessment, the proportionality of the detention, and the absence of any other coercive measures. All these conditions, in the case at issue, were satisfied.

On 15 March 2017 the Court delivered its judgment. The Court referred to article 2(n) of the Dublin III Regulation which requires Member States to establish by law precise objective criteria regarding the reasons for believing that an applicant subject to a transfer procedure may abscond. In the absence of these precise criteria, the detention is considered illegal since deprived of a legal basis, and article 28(2) of the Regulation is not applicable.

After this ruling the applicants were released and left the Czech Republic.

From the human rights point of view, the Court recognized that the unlawful detention of the applicants represented a violation of the fundamental right to liberty enshrined in article 6 of the Charter of Fundamental Rights of the EU, the same right protected also by article 5 of the European Convention on Human Rights. Furthermore, this was supported by the ECtHR, which affirmed that any privation of liberty shall find a legal basis in national law that must be accessible and precise in order to avoid any risk of

²¹² Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Czech Republic, article 129.

arbitrariness²¹³. The Court concluded by claiming that only a binding provision of general application could meet all these requirements. In the absence of them, detention is arbitrary, hence banned by international law and the article 28 of the Dublin Regulation concerning detention upon risk of absconding is not applicable.

The Court reaffirmed the importance that human rights law shall be implemented in the EU asylum system, underlining the fact that development of the EU asylum law depends on its compliance with human rights.

This ruling also reflects the UN human rights norms. In particular, the General Comment no. 31 made by the Human Rights Committee regarding legal obligations imposed on states by the UN Covenant on Civil and Political rights, reads that

“In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right²¹⁴.”

In addition, General Comment no. 35 clearly defines the notion of arbitrariness and argues that it must include

“elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.²¹⁵”

Therefore, the *Al Chodor* case has considerably contributed to focusing the attention on the migrants’ right of freedom, and the requirement of lawfulness and non-arbitrariness regarding detention, which must be respected in all circumstances.

After the analysis of the *X and X v. Belgium* case and the *Al Chodor and Other* case it seems possible to conclude that if the case happens inside the European border, the system

²¹³ ECtHR, *Case of Del Río Prada v. Spain*, Application no. 42750/09, 21 October 2013, par. 125. Available at: <https://www.legal-tools.org/en/browse/record/eae1d4/> (Accessed: 18/12/2018)

²¹⁴ UN Human Rights Committee, CCPR General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004. Available at: <https://www.refworld.org/docid/478b26ae2.html> (Accessed: 03/12/2018)

²¹⁵ UN Human Rights Committee, CCPR General Comment No. 35. *Article 9 (Liberty and security of person)*, 15 December 2014, par. 12. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en (Accessed: 03/12/2018)

of protection of human rights is applicable. Paradoxically, entering the European border for third-country nationals is difficult since the EU leaves all in the hands of Member States. This has been causing a race to the bottom to the protection of human rights, while at the same time entering is the only way to enjoy human rights protection²¹⁶.

4. NGOs and migrants' human rights: The International Federation for Human Rights (FIDH).

One of the fundamental roles played by NGOs is to act as guarantors of respect for human rights. In this respect, an extremely relevant role is covered by The International Federation for Human Rights (FIDH), an international NGO which supports cultural, political, economic, civil and social rights worldwide, on the basis of the Universal Declaration of Human Rights. It consists of 184 Organisations from 112 different countries.

It undertakes activities on a regional, national and international level, supporting its members and cooperating with other local partner organizations and actors, to address rights abuses and encourage democratic processes. Its operations are based on three pillars: rights are universal, rights must be effective, and human rights defenders must be supported and protected.

It refers primarily to states, but also to non-state actors, such as multinational corporations or armed groups, and is committed to assigning the individual perpetrators of international crimes to the justice system. This NGO undertakes investigative missions, legal defence and action, advocacy, and public awareness campaigns, relying on a network of volunteer delegates who facilitate links among human rights defenders worldwide. The NGO engaged in 79 legal proceedings in 2017 alone, accompanying victims of international crimes (such as crimes against humanity, genocide, war crimes, torture, or enforced disappearance) with its Litigation Action Groups, a global network of lawyers, legal experts and magistrates, members of the organization.

The FIDH undertakes analyses about respect of human rights all over the world, and has expressed its opinion about European Union policies. It recognizes that in some cases

²¹⁶ Sara DE VIDO, *Migrants' rights in the jurisprudence of the European Court of Justice*, cit.

they may be problematic: the adopted asylum policies and austerity policies sometimes have paved the way to serious violations of civil, social and political rights. Therefore, the NGO sustains that these policies should be reformed in order to ensure respect of the rights violated. Moreover, adequate protection mechanisms should be created so that Europe can reinforce the rule of law, recalling that

“The strengthening of human rights, democracy and the rule of law must be defended at all times, in all places and under all circumstances.”²¹⁷

The FIDH obviously includes migrants’ rights among the issues it is dealing with. It states that currently 3,2% of the population around the world is composed by migrants, and the common perception of the “Global North” is to be victim of an “invasion” of people from the “Global South”²¹⁸. As a consequence of this fear, policies worldwide are more and more restrictive, border controls more meticulous, and vulnerability of migrants to violation of their rights is exacerbated.

The NGO, examining the European situation about migration, denounces the lack of safe and legal routes, which has the consequence of pushing migrants into the hands of smugglers and undertaking very dangerous sea crossings. It states that Europe is dealing with the situation by trying to unload responsibility to the countries of departure and transit to the South of the Mediterranean, including those countries where human rights are not respected. Therefore, first of all FIDH advocates for the need to create legal and safe routes that lead to Europe, where, for instance, visas are granted, resettlements are increased and family reunification is considered as a priority. Secondly, the NGO calls for the repeal of the Dublin Regulation and asks for a system where migrants’ choices have a relevance, hence migrant persons are allowed to ask for asylum in the country of their own choice. Lastly, it requires to end any collaboration with those states which do not respect migrants’ human rights.

FIDH ensures its support to the NGOs which intervened in saving lives at sea in the Mediterranean area. During the period from 2014 up to early 2018, when, as we have

²¹⁷ FIDH, *European Union*. Available at: <https://www.fidh.org/en/international-advocacy/european-union/> (Accessed: 04/12/2018)

²¹⁸ FIDH, *Migrants’ rights*. Available at: <https://www.fidh.org/en/issues/migrants-rights/> (Accessed: 05/02/2019)

seen, NGOs missions in the area were very frequent, the International Federation has stood by their side, aware of the many cases of disputes and problems between NGOs and states. It gave its opinion and turned to the states, attempting to raise awareness towards the respect of migrants' human rights in the various countries.

5. Specific cases involving NGOs in 2018: The case of ProActiva Open Arms.

One of the most famous and recent controversial cases which involved NGOs and states has the ProActiva Open Arms as protagonist. As described in chapter II, it is one of the main NGOs which intervened in the Mediterranean Sea in order to undertake search and rescue operations, and started its activities in the area in October 2015, from its base of operations in the island of Lesbos.

This case started on 15 March 2018. According to the reconstructions of the events, during the night the NGO vessel received a call from the Libyan Coast guard, informing the NGO members about the presence of a dinghy in difficulty 26 miles from the Libyan coasts, hence in international waters. Actually, the NGO became aware of the presence of two more dinghies loaded with migrants and in dangerous conditions, all in international waters, and thus immediately started the rescue operations of all three dinghies. Meanwhile, the NGO vessel was in continuous contact with the Libyan Coast Guard, which invited the volunteers to proceed with the rescues under its full control. Some reconstructions of the case affirm that some Libyan officials came aboard the NGO vessel and hindered the rescue operations, also threatening personnel onboard with weapons²¹⁹. Furthermore, the Libyan patrol boat was accused of having positioned itself between the vessel and the dinghies, thus interfering with the distribution of life-jackets that the NGO was carrying out. The following morning, the Libyan authorities ordered the ProActiva Open Arms vessel to bring all the people rescued to Libyan coasts, and this was supported also by the Italian authorities, in compliance with the provisions of the Memorandum of Understanding. However, Open Arms firmly rejected the order, arguing

²¹⁹ *Di cosa è accusata ProActiva Open Arms*, Il Post, 19 March 2018. Available at: <https://www.ilpost.it/2018/03/19/open-arms-migranti-sequestro-nave/> (Accessed: 06/12/2018)

that Libyan authorities are known to abuse migrants. Therefore, Libya was forced to retreat.

By that time, an unprecedented procedure was requested by the Italian MRCC: Spain, the flag state of Open Arms, had to ask for the permission to dock on behalf of the NGO. Perhaps, this requested procedure was a consequence of the Italian disapproval of the NGOs not following its instructions, and Italy claimed not to have any responsibility as the coordination of operations belonged to Libya.

Initially, no state opened its ports. The vessel, despite the critical conditions of the 218 people rescued and the worsening weather, waited at sea until 17 March, when it could finally dock at the Italian port of Pozzallo. Immediately after docking, migrants were identified and interrogated by the Italian authorities, in order to better understand the dispute which had occurred with the Libyan Coast Guard during the rescue operations. Few hours later, the Catania Prosecutor's office decided to proceed with the seizure of the vessel, while the NGO's director, the master, and the ship coordinator were accused of criminal association aimed at facilitating illegal immigration. The members of Open Arms were accused of having arbitrarily directed the operations, that instead had to be under the total control of the Libyan Coast Guard, since the activities were conducted within its SAR zone.

Nevertheless, the first consideration that could be raised is that, at the time the facts took place, Libya had still not declared its SAR zone to the IOM. In fact, the country defined it and informed the IOM only in June 2018. Moreover, the Libyan MRCC was aboard the Tremiti ship of the Italian Navy, moored in the Tripoli port, but the IOM did not recognize it as an official MRCC, it was not even present in the official map of MRCCs.

Furthermore, as argued by the ASGI²²⁰, provided that a Libyan MRCC did not exist, according to international maritime law, the first MRCC informed about the necessary operations is in charge of rescues and must lead people to a safe port. Therefore, the responsibility was of the Italian Coast Guard.

The second consideration which could be made regards the safety of migrants. The NGO vessel explained its refusal to take migrants to Libya because it cannot be considered a

²²⁰ ASGI, *ProActiva Open Arms: Comunicato dell'ASGI*, 19 March 2018. Available at: <https://www.asgi.it/asilo-e-protezione-internazionale/proactiva-open-arms-sequestro/> (Accessed: 06/12/2018)

safe place. In this way, the NGO followed the instruction established by the law of the sea, in particular by the 1979 International Convention on Maritime Search and Rescue (Hamburg Convention) and the Guidelines on the Treatment of Persons Rescued at Sea. Moreover, it can be interpreted as a will to respect the non-refoulement principle, given the risk of cruel treatment migrants could be subjected to in Libya. This was supported by the Commissioner for Human Rights at the Council of Europe Nils Muižnieks, who already the year before, in a letter²²¹ addressed to the Italian Minister of the Interior Minniti, recognized that according to the recent reports about migrants' conditions in Libya, handing people to Libyan authorities could expose them to serious violations of their fundamental rights.

This case is a perfect example of the consequences on NGOs after the creation of the Memorandum of Understanding and the inevitable incompatibility with the will to respect human rights. The externalization of policies in this event clearly shows how safeguarding migrants' rights comes after politics and the priority to unload responsibility.

In April 2018, the Crown Prosecutor rejected the accusations brought against the NGO and ordered the release of the seized Open Arms vessel. He recognized there was no proof that Libya applied sufficient measures of protection of migrants' fundamental rights, and no proof of the presence of safe ports in the country. Therefore, the NGOs' disobedience to the MRCC is legitimated by the state of necessity, hence by both international maritime and humanitarian law. Moreover, no evidence could support the crime of facilitating illegal immigration²²².

²²¹ Council of Europe, *Commissioner seeks clarifications over Italy's maritime operations in Libyan territorial waters*, 11 October 2017. Available at: <https://www.coe.int/en/web/commissioner/-/commissioner-seeks-clarifications-over-italy-s-maritime-operations-in-libyan-territorial-waters?desktop=true> (Accessed: 06/12/2018)

²²² Alessandra ZINITI, *Dissequestrata la nave ProActiva Open Arms: "La Libia non è in grado di accogliere migranti"*, La Repubblica, 16 April 2018. Available at: https://palermo.repubblica.it/cronaca/2018/04/16/news/migranti_il_gip_di_ragusa_dissequestra_la_nave_proactiva_open_arms-194015345/?ref=search (Accessed: 07/12/2018)

5.1 The cases of SOS Méditerranée and its Aquarius vessel.

Another relevant case that was source of intensive debates and polemics involved the Aquarius vessel of the NGO SOS Méditerranée, just few months after the abovementioned ProActiva Open Arms case. Actually, up to the present time the Aquarius has been involved in two controversial cases. Let's analyse both of them in order.

On 9 June 2018, the Aquarius undertook several missions in the Mediterranean area between Italy and Malta, in order to save a large number of migrants in distress. During six operations, which lasted more than nine hours, the vessel was able to rescue more than a hundred migrants who were aboard two dinghies, and among them 40 people who had fallen overboard after a dinghy capsized. In addition, the NGO vessel also accepted the transfer of other people rescued by the Italian Navy and Coast Guard. The San Giusto ship of the Italian Navy helped the Aquarius with the last transfer: other 119 more people were carried onboard from the Italian merchant ship MV Jolly Vanadio.

629 persons in total were saved from the sea on that day alone, among them there were 123 minors, and 7 pregnant women²²³.

All these operations were performed under the command of the Italian MRCC. Nevertheless, when rescues and transfers ended, Italy did not allow the Aquarius access to its ports, demanding that Malta accepted the huge number of migrants. Valletta refused, affirming that the case did not fall within its competence according to international maritime law, since rescues did not occur within its SAR zone nor had Maltese MRCC intervened in the coordination of operations. This answer caused a two-day deadlock²²⁴ during which the Aquarius vessel, rejected by two states, was forced to stay at sea with many people in increasingly desperate conditions. Fortunately, some members of Médecins Sans Frontières were on board and could provide assistance.

After the United Nations and the European Union put pressure on the two nations to find a solution as soon as possible, Italy appealed for fellow EU members to take charge of

²²³ *L'Aquarius non approderà in Spagna*, Il Post, 11 June 2018. Available at: <https://www.ilpost.it/2018/06/11/aquarius-migranti-salvini/> (Accessed: 07/12/2018)

²²⁴ A deadlock is defined by Guy Olivier Faure as “an impasse in terms of position, a situation in which no concession or constructive action takes place”. Guy Olivier FAURE, *Deadlocks in negotiation dynamics*. At: William ZARTMAN and Guy Olivier FAURE, *Escalation and Negotiation in International Conflicts*, Cambridge, Cambridge University Press, 2005, p. 25.

the migrants. Only on 11 June did the Spanish Prime Minister Pedro Sánchez offer to host the vessel and its passengers at the port of Valencia. However, the NGO did not approve this proposal: Spain was too far away (it required at least three- or four-days sailing), and the conditions of some migrants onboard were so serious they could not wait so long to reach safety. In addition, worsening weather conditions were forecasted and the vessel had exceeded its maximum capacity (calculated in 550 persons). Therefore, SOS Méditerranée tried to pressure Italian government to open its ports, since they were the nearest. However, in vain.

On 12 June the decision was taken: some of the migrants were transferred to two Italian vessels while others stayed on the Aquarius, and the three vessels together brought them to Valencia. A crowd of more than 2,000 volunteers, translators and health officials waited for them on shore, as well as some members of the Red Cross with its Secretary General Elhadj As Sy. He commented underlining the fact that the odyssey those people had gone through during the days at sea should be a reminder that all people, regardless their status, should have access to basic protection. He added that no person is illegal, and when help is needed, it should always be ensured²²⁵.

On the other hand, the Italian decision to close its ports to the Aquarius was taken by the Italian Minister of Interior Salvini, who claimed this was a sign that Italy did not want to accept migrants and look like “Europe’s doormat²²⁶” anymore. He received great support from the other European parties which sustain the closure of ports to migrants rescued by NGOs. Among them, the Hungarian Viktor Orbán reacted with a “Finally!” exclamation to the decision which he defined as a

“Great moment which may truly bring changes in Europe’s migration policies²²⁷.”

²²⁵ *Aquarius migrant ship arrives in Spain after rough week at sea*, ABC News, 18 June 2018. Available at: <https://www.abc.net.au/news/2018-06-18/aquarius-migrant-ship-arrives-in-spain-after-rough-week-at-sea/9879018> (Accessed: 08/12/2018)

²²⁶ Sara MALM, *Hungary's anti-migrant PM praises Italy for turning away rescue ship full of migrants and calls it 'a great moment for Europe'... while President Macron condemns the move as 'irresponsible'*, The Daily Mail, 12 June 2018. Available at: <https://www.dailymail.co.uk/news/article-5834213/Migrants-rejected-Italy-Malta-transferred-Italian-navy-ships.html> (Accessed: 07/12/2018)

²²⁷ *Ibidem*.

The second case which involved SOS Méditerranée occurred on September 2018, when the vessel renamed Aquarius 2²²⁸ returned to operate in the Mediterranean Sea, also in this case counting on the support of Médecins Sans Frontières.

Aquarius 2 intervened off Libyan coasts but in international waters, and, after several negotiations with the Libyan Coast Guard followed by long and difficult search and rescue operations, saved 58 people from water, including 16 minors. Again, the NGO had to face the problem of where to bring the rescued migrants. Firstly, the Aquarius members asked Italy and Spain for permission, but received a refusal from both countries. Another alternative was represented by the Marseille port, even if this would be an exception respect to the norm of the nearest port. However, also France expressed its opposition.

To make the issue even more complicated, Panama, the vessel flag state, right during the operations, initiated the procedures to withdraw its flag and delete the name of Aquarius from its maritime registers for “failure to comply with international legal procedures”. The reason for this decision was the refusal of the NGO to cooperate with the Libyan Coast Guard to which the Aquarius members, according to Panama, should have delivered the rescued migrants. The refusal was seen by the flag state as a violation of international law²²⁹. Again, in this case NGO and states were facing a situation where humanitarian law did not permit the application of maritime law, but the two parties supported different priorities.

SOS Méditerranée accused Italy of exercising political and economic pressures on Panama for this decision, but the Italian Minister of Interior firmly denied the accusation, stating that Panama simply “did not want to be identified with a vessel which hinders rescues at sea²³⁰.” With no flag, the Aquarius 2 could be considered as a pirate vessel. Nevertheless, it was still loaded with migrants and a solution to save their lives was still absolutely necessary.

²²⁸ The Aquarius was previously sailing under the Gibraltar’s flag, but on August 2018 the state withdrew its flag. Therefore, the vessel passed under the Panama flag and changed its name in Aquarius 2.

²²⁹ Autoridad Marítima de Panamá, *Aquarius 2*” ex “*Aquarius*, 21 September 2018. Available at: <http://www.amp.gob.pa/newsite/spanish/prensa/noticias/2018/septiembre/20180905.html> (Accessed: 09/12/2018)

²³⁰ Claudio DEL FRATE, *La ONG Aquarius salva 50 migranti e Panama le ritira la bandiera*, Corriere della Sera, 23 September 2018. Available at: https://www.corriere.it/esteri/18_settembre_23/ong-aquarius-salva-50-migranti-panama-ritira-bandiera-1a5f2eda-bf3d-11e8-87df-bb2b7cf6f481.shtml (Accessed: 09/12/2018)

After some negotiations among states, an agreement was reached: Portugal, Spain, France, and Germany decided that migrants should be brought to Malta, and from there, they would be distributed towards the four states in different quotas. Portugal received 10 migrants, France 18, Spain and Germany 15²³¹.

In this case, what became evident was the total refusal of Italy to cooperate and its firm decision to keep its ports closed to NGOs. This was the sign of a crisis particularly between Italy and Europe regarding the immigration issue, due to the clear choice of the country to disregard both maritime and humanitarian law.

These cases are further demonstrations of Europe's failure to agree about the management of migration flows and of the disregard of international maritime law, humanitarian law, and provisions of the Dublin Regulation. Moreover, the friction between NGOs and states has become increasingly evident. On the one hand, vessels have continued to save lives, on the other hand, states have continued to refuse those lives access to their borders.

²³¹ *Portogallo, Francia, Germania e Spagna accoglieranno i migranti dell'Aquarius*, TGC24, 25 September 2018. Available at: <https://www.tgcom24.mediaset.it/mondo/portogallo-francia-germania-e-spagna-accoglieranno-i-migranti-dell-aquarius-malta-sbarcheranno-al-largo-poi-in-ue-3165255-201802a.shtml> (Accessed: 13/12/2018)

CHAPTER IV

CURRENT APPROACH TO THE ISSUE OF MIGRATION AND FUTURE DEVELOPMENTS

1. The retreat of NGOs from the Mediterranean area after August 2018.

From July until the end of August 2018 NGOs progressively decided to leave the Mediterranean Sea and the majority of them have no longer operated on the main migration routes between Southern Europe and Northern Africa.

This choice made by the NGOs was a consequence of the anti-immigration policies undertaken by European states (in particular by the Italian and Maltese governments) which have placed ever-increasing obstacles in the path of rescue operations by closing ports, creating considerable inconveniences for the disembarking of migrants, and conducting campaigns of criminalization against NGOs. Nevertheless, migrants have not stopped trying to cross the sea.

This was not the first time NGOs had suspended activities in the Mediterranean. Indeed, from 28 June to 8 July 2018 there were no rescue vessels in that area, and in those few days more than 300 migrants died at sea²³².

The death toll has decreased compared to 2017, but in 2018 the number of drownings in proportion to arrivals in Italy rose, and the possibility of death during the crossing was estimated to be three times higher, as the following Figure 6 shows.

²³² Lorenzo TONDO and Karen MCVEIGH, *No NGO rescue boats currently in central Mediterranean, agencies warn*, The Guardian, 12 September 2018. Available at: <https://www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean> (Accessed: 13/12/2018)

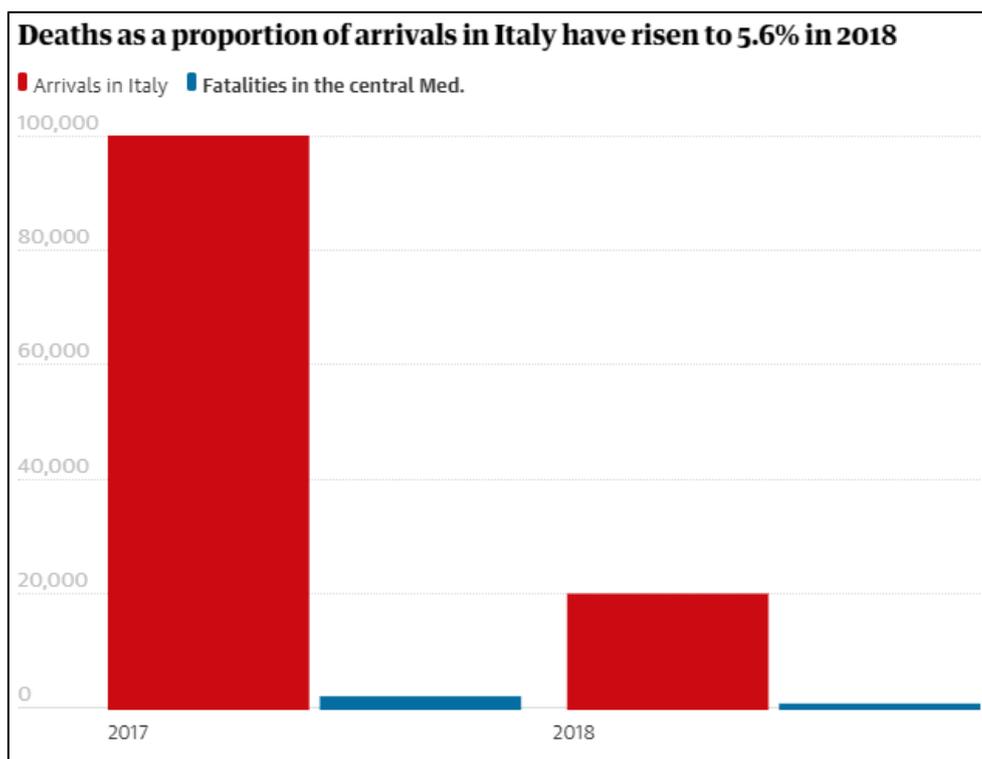


Figure 6: Deaths as a proportion of arrivals in Italy in 2018. Source: graph created by theguardian.com with IOM's data²³³.

The IOM's data prove that in 2017 approximately 100,000 migrants reached the Italian coasts, while the number of deaths because of shipwrecks was estimated to be around 2,000 people. Instead, in 2018 due to the closure of ports only about 20,319 people were brought to Italian ports by NGOs vessels, while 1,130 drowned at sea. These data show that the number of arrivals drastically decreased but the number of drownings did not change significantly.

Among the NGOs which operated in the Mediterranean, in August the Open Arms vessel left the area right after the controversial case analysed in the previous chapter and came back to the port of Barcelona. From that moment, it started to carry out operations mainly in the stretch of sea between Spain and Morocco. Due to the closure of Italian and Maltese ports, migration flows have recently shift mainly towards Spain. According to the IOM,

²³³ Lorenzo TONDO and Karen MCVEIGH, *No NGO rescue boats currently in central Mediterranean, agencies warn*, cit.

around 49,000 people arrived on the Spanish coasts from January to November 2018, compared to the approximately 16,000 people who arrived in the same period of 2017²³⁴. The Jugend Rettet's vessel Iuventa was seized by the Trapani Procurator since its members were accused of facilitating people smuggling and illegal immigration. The Sea Watch and the Seefuchs vessels were stranded at the port of Malta until November. The Aquarius 2 of the NGO SOS Méditerranée was the last vessel which abandoned the Mediterranean, and after the case in which it was forced to detour migrants to Spain in September and it lost its second flag state, it decided to return to Marseille. On 6 December, Médecins Sans Frontières published an announcement on its website where it stated that, due to the many obstacles put by European governments and the inadequate European migration policies, the Aquarius 2 operations were definitely concluded²³⁵. Therefore, from August 2018 the maritime zones near the Libyan coasts have been patrolled mainly by the Libyan Coast Guard. Nevertheless, in November, after months of blockade, unexpectedly a new rescue mission started in the Libyan SAR zone. It was conducted by ProActiva Open Arms, Sea Watch 3 and the Italian vessel Mare Jonio. This was called "the first European monitoring operation of the Mediterranean²³⁶", since it was the first-time different organizations with different flag states cooperated in a single operation. This was the beginning of a new period of search and rescue activities carried out by a few NGOs members with the volunteers of a new Italian organization: Mediterranea.

²³⁴ IOM, *Mediterranean Migrant Arrivals Reach 100,630 in 2018; Deaths Reach 1,989*, 11 June 2018. Available at: <https://www.iom.int/news/mediterranean-migrant-arrivals-reach-100630-2018-deaths-reach-1989> (Accessed: 19/12/2018)

²³⁵ Médecins Sans Frontières, *Aquarius costretta a chiudere le operazioni mentre l'Europa condanna le persone a morire in mare*, 6 December 2018. Available at: <https://www.medicisenzafrontiere.it/news-e-storie/news/aquarius-costretta-a-chiudere-le-operazioni-mentre-leuropa-condanna-le-persone-a-morire-in-mare/> (Accessed: 19/12/2018)

²³⁶ Marco MENSURATI, *Migranti, le ONG tornano in mare insieme per salvare vite*, La Repubblica, 22 November 2018. Available at: https://www.repubblica.it/cronaca/2018/11/22/news/migranti_le_ong_tornano_in_mare_per_salvare_vite-212324210/ (Accessed: 18/12/2018)

1.1 The intervention of the **Mediterranea Organization.**

Mediterranea is an Italian organization set up in October 2018 in order to make up for the lack of intervention in search and rescue operations in the Mediterranean area after the retreat of NGOs. In accordance with the previous NGOs' activities, its volunteers are also in charge of observing, documenting and witnessing all events that involve migrants in the Mediterranean Sea, since nowadays no other organization undertakes these activities. It does not identify itself as a Non-Governmental Organization, but as a "Non-Governmental Action", a project carried out by the joint efforts of individuals and various organizations, with different cultures, religions, social and political perspectives, but united under the common goal of conducting rescue missions and defending human rights. The organization defines its action as "moral disobedience and civil obedience"²³⁷, since it distances itself from the main current Italian policies which it defines as xenophobic and nationalist, while declaring its will to comply with constitutional law, international maritime laws, and humanitarian laws.

Mediterranea has brought to the Mediterranean Sea its vessel Mare Jonio flying the Italian flag, but it also works on land with a territorial support network. It benefits from the support of many volunteers, donors, crowdfunding activities, but its operations are possible mainly thanks to the funding granted by Banca Etica.

Currently it cooperates with members of the NGOs ProActiva Open Arms and Sea Watch, and their alliance has created a "humanitarian fleet" with a joint mission which has the name of UNITED4MED. On 28 November 2018, the representatives of the three organizations met in a joint press conference in Barcelona and presented their Manifesto, stating that their main objective is "to defend the most basic rights of people: life and dignity"²³⁸. Moreover, they appealed to European citizens, mayors, organizations, and all civil society to join them and support their mission. They asked people not to stay silent in the face of the European policies which they consider to be unfair and inhumane, but to become aware and active citizens, who demand the respect of laws and constitutions.

²³⁷ Mediterranea website. Available at: <https://mediterraneaescue.org/en/mediterranea-en/> (Accessed: 19/12/2018)

²³⁸ #UNITED4MED, *la flotta umanitaria per difendere «la vita e la dignità»*, Vita, 23 November 2018. Available at: <http://www.vita.it/it/article/2018/11/23/united4med-la-flotta-umanitaria-per-difendere-la-vita-e-la-dignita/149868/> (Accessed: 19/12/2018)

They asserted that the Mediterranean has become the most dangerous border in the world, with more than 15,000 deaths in the last five years. They believe in an inclusive Europe which considers human rights and democracy as its priorities; for this reason, they have created an alliance for a solidarity-based Europe at sea and on land. To open their Manifesto there is a quote by Martin Luther King Jr, which summarises and expresses their motivation:

“The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.”

Their mission can also count on the support of two aircrafts for monitoring the Mediterranean from the air, the Moonbird and the Colibrì. The former belongs to the NGO Sea Watch, the latter is a small propeller Mcr-4S owned by the two French pilots Benoit Micolon and José Benavente who volunteered to help with search and rescue activities.

Among the operations carried out up to now, on 22 November 2018 Mediterranea intervened to help the Spanish fishing boat Nuestra Madre De Loreto, which had rescued 12 migrants in distress at sea and could not receive permission to dock anywhere. Its flag state required them to refer to the Libyan Coast Guard as the rescues occurred within Libya’s SAR zone, but not only did the Coast Guard not even answer the alarm signals, but the fishermen decided to respect the non-refoulement principle and not bring migrants back to Libya. No state opened its ports, therefore the three organizations of UNITED4MED intervened and provided medical assistance, food and water provisions for the 10 days the fishing boat was forced to remain at sea. Finally, on the tenth day Malta agreed to host the migrants and the Maltese Coast Guard helped with disembarkation.

Nevertheless, exactly during this mission, a new and more serious alarm was received: a dinghy which had just left from Libya with 120 people aboard was capsizing. Therefore, the volunteers, helped by the Moonbird aircraft, intervened promptly to face this emergency and identify the position of the dinghy. The Italian and Libyan Coast Guard were both aware of the situation, but the volunteers stated the Libyans did not launch any Navtex (a signal which aims at informing all vessels nearby about the presence of a boat

in distress), moreover they suddenly became untraceable and stopped answering their calls. After hours of waiting, during the night migrants were saved by a tug near the Libyan coasts.

On 21, 22 and 29 December three more rescue operations were needed in the Mediterranean and the humanitarian fleet UNITED4MED intervened with some vessels. Open Arms rescued 311 people and took them to Spain. The Sea Watch 3 and the Sea Eye (which decided to return to operate in that occasion) rescued from the sea and took on board respectively 32 and 17 people. Some German cities declared their willingness to host those people, however no coastal state wanted to open its ports. Therefore, the boats were again forced to stay at sea, despite the low temperatures and the increasingly scarce food and water provisions. On 2 January 2019, since the sea and weather conditions were getting worse as well as the health of some migrants, the Maltese government agreed to allow the two vessels to enter its territorial waters and provide assistance, however without allowing them to dock. After many days of deadlock among the European States, on 9 January 2019 Malta agreed to open its port and allow them to disembark.

On 30 November two volunteers of Mediterranea held a conference at Ca' Foscari University. They explained their missions and ideals, which are guided by the firm willingness to protect human rights and save those lives that European governments decide to leave at sea. They argued that illegal migration is a political choice, since it depends on the decision not to open any legal and safe channel for migrants. Moreover, since Mare Jonio is not an NGO vessel but is an Italian ship, they noted how Italy should not forbid it to dock in Italian ports, however this happens anyway. They underlined how the feeling of solidarity among people is becoming increasingly rare and weak, and for this reason they affirmed “We are in the middle of the Mediterranean Sea in order to save ourselves. It is our humanity that we are saving.”

2. A humanitarian not a migration crisis.

What the Mediterranean countries have been witnessing from 2014 up to the present time may be better defined as a “humanitarian” more than a “migration” crisis, since it is the

result of a series of events that still threaten a large portion of the global population and require an international response²³⁹. Nevertheless, mainstream media usually refer to the issue using the labels “migration crisis” or “refugee crisis”, thus reproducing the hegemonic understandings of migration which actually do not consider in detail all the complexities involved. Moreover, by using these terms, the resulting implication is that the current crisis is the fault of migrants themselves²⁴⁰. Medias most of all focus attention on the fact that these huge movements of people have negative impacts on the “developed west of the world”, rather than focusing and informing on the reasons why those people flee from their country of origin. In fact, a theme which often follows the discourses on this issue is that of being overwhelmed by an uncontrollable flood or a tide of migrants, who are always “othered”²⁴¹. Therefore, refugees and migrants are seen as threats to prosperity and (illusory) homogeneity of national communities. This way of addressing migration has a direct impact on public knowledge and consequent negative approach towards migrants, besides on local political discourses and responses.

Furthermore, the so-called migration crisis is accompanied by the perception of the total failure in the management of the regional migration system²⁴². However, this idea may be partially denied through the consideration that actually the European migration system for millions of people proceeds perfectly smoothly. According to the UN World Tourism Organization, in 2016 around 620 million people entered the EU, with more than 15 million Schengen visas issued²⁴³. Therefore, for a very large part of the population, the migration system works fine and grants a safe, legal and regular mobility. The problem is that many who need access to migration in order to escape conflicts, climate-change-induced disasters, or exposure to violence are instead excluded from legal and safe mobility options. Also for this reason, it would be better to call it a humanitarian or “reception crisis”²⁴⁴. The excluded are victims of a system of inequality that mostly

²³⁹ UNHCR, *Coordination in Complex Emergencies*, 1 September 2001. Available at: <https://www.unhcr.org/partners/partners/3ba88e7c6/coordination-complex-emergencies.html> (Accessed: 08/01/2019)r

²⁴⁰ Eoin DEVEREUX, *Refugee crisis or humanitarian crisis?* 2017. Available at: <https://www.developmenteducationreview.com/issue/issue-24/refugee-crisis-or-humanitarian-crisis> (Accessed: 08/01/2019)

²⁴¹ *Ibidem*.

²⁴² Jacqueline BHABHA, *Can we solve the migration crisis?* Cambridge, Polity Press, 2018, p. 61.

²⁴³ Ivi, p. 62.

²⁴⁴ Ivi, p. 63.

disadvantages poor and non-white populations²⁴⁵. One aspect which supports this consideration concerns the long periods these people are forced to stay in “temporary” solutions, such as refugee camps, where the average time is 10 years²⁴⁶. Another aspect of failure in the system is represented by the maldistribution of hosting responsibilities, since the base principle of fair sharing of responsibility is invariably disregarded. For this reason, besides facing a humanitarian crisis, it is possible to claim that we are facing also a crisis of humanity. We are losing more and more that sense of solidarity and cooperation which should be the base of the European community (and also of the global community as a whole) in facing emergencies like this, where many people almost everyday risk their lives trying to reach better ways of living. Evidence of this, is the fact that currently NGOs loaded with migrants are facing more and more difficulties to find an open port that accepts them, and they are left at sea for ever-longer periods. European states are not cooperating on the managing of the issue, and continue shifting responsibilities from one another, causing prolonged deadlocks. Hence, actually, what emerges is the impression that politics is forgetting humanity, and the label “migration crisis” is just a tactic in order not to recognize the humanitarian emergency under way.

2.1 Possible changes to improve the management of migration flows in the Mediterranean area.

According to the serious situation Mediterranean countries are facing, various initiatives are needed in order to improve the management of migration flows. Raising barriers and closing ports, as numerous states are doing, does not seem to be the most effective solution.

First of all, the management of migration flows would need a common European policy. Moreover, a new approach of cooperation among states is absolutely essential²⁴⁷.

²⁴⁵ Jacqueline BHABHA, *Can we solve the migration crisis?* cit., p. 64.

²⁴⁶ *Ibidem*.

²⁴⁷ Pierantonio PANZERI, *I flussi migratori non si fermano con le parole. Serve l'Europa.*, Huffington Post, 15 June 2018. Available at: https://www.huffingtonpost.it/pierantonio-panzeri/i-flussi-migratori-non-si-fermano-con-le-parole-serve-leuropa_a_23459680/ (Accessed: 10/01/2019)

In addition, it would be important to intervene on public opinion, since a wave of racism and intolerance towards migrants is spreading among European citizens, fomented by widespread political statements which depict migrants as invaders. Therefore, there is the necessity to restart from solidarity among states, but also from solidarity among people. On 12 September 2018, President Juncker delivered his annual speech on the conditions of the European Union in front of the members of the European Parliament. On the same occasion, the Commission proposed 18 initiatives on different issues, and one of them concerned migration.

First of all, the Commission recommended reinforcing the operational capacity of the EU Agency for Asylum, providing it with appropriate staff, instruments, and financial means to support Member States during the asylum procedures, in order to carry them out quickly and avoid delays. The Agency will have to work along with the Coast Guard and they will be able to provide states with support teams made up of experts in the field of asylum and management of migration flows. The Agency will also be available to provide technical assistance during the asylum procedure established by the Dublin Regulation, for instance to define the competent state for the examination of asylum applications or to ensure safe transfer of people among Member States, besides helping with identification and registration of applicants and holding interviews with translation services²⁴⁸.

Furthermore, the Commission proposed to better equip the European Border and Coast Guards, in order to improve efficiency on border controls, at the same time enhancing security and repatriation procedures in full compliance with fundamental rights. For this purpose, a new permanent body of 10,000 agents will be established and distributed along the European borders by 2020. It will work in direct contact with the European Agency for Asylum, and will reinforce the operational capacity of the Coast Guard. It will also enhance cooperation with third countries with which it will be able to launch joint operations and send staff (after preliminary agreements) to offer support for border management and return. In this regard, the Commission stated that it is essential to develop an effective policy on return, focusing on fighting illegal migration and granting

²⁴⁸ European Commission, *A reinforced European Union Agency for Asylum*, 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-reinforced-agency-asylum_en.pdf (Accessed: 11/01/2019)

international protection to people who really need it²⁴⁹. Therefore, the European Union should adopt new and stricter norms to increase the effectiveness of the return policy, performing a review of the 2008 Return Directive²⁵⁰.

Finally, the Commission recognized the priority of creating safe and legal pathways for migrants in need of international protection. For this reason, it stated that Parliament and Council should quickly reach an agreement on the proposal of a permanent Union framework for resettlement. Meanwhile, by October 2019 states have to honour the commitment of undertaking 50,000 resettlements²⁵¹. In addition, the Commission affirmed the need to integrate legal migration into the foreign policy of the Union and create legal pathways also for migration based on labour needs. In fact, a cooperation focused on legal pathways with third countries may contribute to decrease illegal migration, improve the management of migration flows in general, but may also be useful for the Union in order to find highly-skilled personnel who may fill the present gaps in certain sectors of the Member States' labour market. On this issue, the Commission decided to launch a series of pilot projects between Member States and the African states which promote legal migration frameworks for professional or internship purposes²⁵².

3. Migration issue internationally: The NGO Committee on Migration.

Migration is obviously not an issue which only concerns Europe, but is a hot topic at global level, where a contribution about its management has also been given by NGOs.

²⁴⁹ European Commission, *A strengthened and fully equipped European Border and Coast Guard*, 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-coast-guard_en.pdf (Accessed: 11/01/2019)

²⁵⁰ EU, Directive 2008/115/EC of the European Parliament and of the Council, 16 December 2008. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF> (Accessed: 10/01/2019)

²⁵¹ European Commission, *A stronger and more effective European return policy*, 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-returns-policy_en.pdf (Accessed: 11/01/2019)

²⁵² European Commission, *Enhancing safe and legal pathways to Europe*, 12 September 2018. Available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-legal-pathways_en_0.pdf (Accessed: 11/01/2019)

In 2006 in New York some international NGOs formed a special Committee devoted to this topic, called the NGO Committee on Migration (CoM). It is a member of the Conference of Non-Governmental Organizations (CONGO) and has a consultative status with the United Nations Economic and Social Council. Its mission is to advocate, educate and cooperate to protect migrants' rights in accordance with the United Nations Charter²⁵³. This is accomplished by facilitating the exchange of information among the members, cooperating with UN bodies and Agencies encouraging them to include appropriate migration policies in their planning, raising awareness of migration in the human rights framework.

The Committee engages in several issues, each of which is addressed by a Subcommittee. For instance, in 2014-2015, a specific Subcommittee focused in particular on the issue of the emergency at sea, concerning the protection of refugees, stateless and internally displaced persons, in a period in which migration flows and sea crossings were drastically increasing, as we have seen, especially in the Mediterranean area.

Currently, for the period 2018-2020 its efforts are focused on four specific issues. The first concerns the fight against xenophobia and the improvement of social inclusion. For this purpose, the Subcommittee in charge of this subject produced an infographic in behalf of migrants, reporting the most common accusations and myths against migrants with the real data which actually disprove them. For instance, it is widely believed that migrants hurt a country's economy. The infographic explains that, in most countries, migrants contribute more in taxes and social contributions than they receive in individual benefits. In the USA, immigrants will pay \$80,000 more in taxes during their lifetimes than what they received by the government services²⁵⁴.

Another important issue of interest for the CoM is climate change and the resulting disasters which cause climate-induced displacement of millions of people. Concerning this subject, the Subcommittee published a brochure useful for any government or person who wants to better understand the phenomenon and to know what it is possible to do to help these people and prevent their number from growing²⁵⁵.

²⁵³ NGO Committee on Migration website. Available at: <https://ngo-migration.org/> (Accessed: 03/01/2019)

²⁵⁴ CoM, *Debunking Myths to End Xenophobia*, March 2017. Available at: <https://ngo-migration.org/task-force/campaign-against-xenophobia-and-for-social-integration/> (Accessed: 03/01/2019)

²⁵⁵ CoM, *New Brochure on Climate-Induced Displacement*, March 2017. Available at: <https://ngo-migration.org/task-force/climate-induced-displacement/> (Accessed: 03/01/2019)

Another topic which the CoM considers as a priority is the protection of refugee and migrant children. The mission of its Subcommittee is to ensure that children are considered as a single category which needs a specific and accurate human-rights based approach, in accordance with the Convention on the Rights of the Child²⁵⁶. During all the years of operation, the Subcommittee has focused mainly on the eradication of child detention and the respect of the right to education. Moreover, it pays a great deal of attention to the protection of migrant parents. In collaboration with some NGOs such as World Vision and Caritas Internationalis, in 2018 it published a booklet which explains practices to protect children's rights and provides useful material about birth registration, access to education and health services for migrant children²⁵⁷. Finally, the CoM in 2016 created a Subcommittee which participated in the preparatory processes for the negotiations of the Global Compact for Safe, Orderly and Regular Migration.

3.1 Possible impact of the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact on Refugees.

The United Nations has recently contributed to the issue of migration at global level by drafting two documents which describe the guiding principles states should follow in order to better address the issue: The Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact on Refugees. The former is the first international non-binding agreement created under the auspices of the United Nations which concerns all aspects of migration.

On 19 September 2016 for the first time Heads of State and Government met at the UN General Assembly to discuss migration, therefore sending the message that enhanced cooperation is necessary at global level, and that it has become a subject of great importance in the international agenda. On that occasion, the New York Declaration for

²⁵⁶ UN, *Convention on the Rights of the Child*, 20 November 1989. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (Accessed: 03/01/2019)

²⁵⁷ CoM, *Booklet on Children for the Processes to Adopt a Global Compact on Refugees and a Global Compact for Migration*, 2018. Available at: <https://ngo-migration.org/task-force/refugee-children/> (Accessed: 03/01/2019)

Refugees and Migrants²⁵⁸ was adopted. First of all, its commitments concern the protection of migrants' human rights and fundamental freedoms regardless of their migratory status and at all times. Furthermore, it intends to support the countries which rescue and host a large number of migrants and it encourages the integration of migrants in humanitarian and development planning. The Declaration also urges the parties to stand against xenophobia and racism, developing non-binding principles and guidelines in order to help migrants in vulnerable conditions. Finally, it requires the strengthening of the global governance on migration, by including the IOM in the UN system and developing a Global Compact for Safe, Orderly and Regular Migration, whose scopes are specified in Annex II of the Declaration.

In April 2017 the negotiations for the creation of the document began²⁵⁹, and on 13 July 2018 its final draft was adopted. 193 Member States agreed to the final draft of the document, with the sole exception of the United States of America.

The GCM, as specified in points 1 and 2 of the Preamble, rests on the principles of the Charter of the United Nations and of the main International treaties protecting human rights and environment, as well as on the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda. It

“[...] fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law²⁶⁰.”

The document sets out the common understanding of the phenomenon by the parties, since it is the product of a long process where states have shared their views and considerations. They recognized the need to share data and provide migrants with clear information about their rights and about the risks of irregular migration. At the same time,

²⁵⁸ UN, *New York Declaration for Refugees and Migrants*, 13 September 2016. Available at: https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration.pdf (Accessed: 05/01/2019)

²⁵⁹ The negotiations took place according to the provisions defined in the *Resolution on the modalities for the intergovernmental negotiations of the GCM (A/RES/71/280)*, adopted by the General Assembly on 6 April 2017. Available at: http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_280.pdf (Accessed: 05/01/2019)

²⁶⁰ UN, *Global Compact for Safe, Orderly and Regular Migration*, 11 July 2018, point 7. Available at: https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf (Accessed: 05/01/2019)

citizens of receiving countries must be correctly informed about the benefits and challenges of migration in order to dispel the widespread negative perceptions about migrants²⁶¹. Moreover, in the GCM the parties acknowledge their shared responsibilities and joint efforts in order to reduce the risks migrants face during migration, by respecting their rights and providing them with the necessary care and assistance²⁶². In addition, the parties affirm the unity of their purposes and agree on the respect of a set of principles that must guide their actions, such as national sovereignty, human rights, rule of law and due process, and the fact that the GCM is people-centred, therefore places the individual as its priority²⁶³.

Reaffirming the commitments set out by the New York Declaration, the GCM specifies 23 objectives for the parties and describes the actions that they must perform in order to achieve each of them at local, national, regional and global levels. Among the main objectives, the parties undertake to minimise the push factors which lead people to flee from their country of origin, deliver information at all stages of migration, and ensure that migrants have adequate documentations and legal identity, besides providing them access to basic services. Furthermore, the states commit to save lives and coordinate efforts on missing migrants, fight the smuggling of migrants, and facilitate return and readmission²⁶⁴. Finally, the document explains the means of implementation of the objectives and provides a framework for follow-up and review among Member States.

On 10 and 11 December 2018 the Intergovernmental Conference to adopt the GCM took place in Marrakech, Morocco. The document was adopted by the General Assembly with 152 votes in favour, 12 abstentions and 5 votes against²⁶⁵. The opponents were the Czech Republic, Hungary, Israel, Poland, and the United States of America. These countries raised mainly two criticisms: the agreement does not respect national sovereignty, and it does not distinguish among the various types of migrants, in particular between refugees

²⁶¹ UN, *Global Compact for Safe, Orderly and Regular Migration*, cit., point 10.

²⁶² UN, *Global Compact for Safe, Orderly and Regular Migration*, cit., point 12.

²⁶³ UN, *Global Compact for Safe, Orderly and Regular Migration*, cit., point 15.

²⁶⁴ The 23 objectives are listed from point 16 to 39 of the Global Compact.

²⁶⁵ *General Assembly officially adopts roadmap for migrants to improve safety, ease suffering*, UN news, 19 December 2018. Available at: <https://news.un.org/en/story/2018/12/1028941> (Accessed: 05/01/2019)

and economic migrants²⁶⁶. Nevertheless, it is worth noting that the GCM is non-legally binding, therefore its adoption does not place any obligation on Member States. Moreover, national sovereignty is included in point 15 as one of the guiding principles on which the document is based and that the parties must respect. It is possible to contradict also the second criticism, since point 4 explicitly underlines the fact that refugees and migrants are two distinct groups with different legal frameworks, and only refugees are entitled to international protection.

Exactly on the question of refugees, in Annex I of the New York Declaration, Member States invite the UN High Commissioner for Refugees to include the adoption of another non-binding agreement in his annual report to the General Assembly in 2018: The Global Compact on Refugees. Its final draft was decided on 26 July 2018.

Based on the Comprehensive Refugee Response Framework²⁶⁷, this document aims at strengthening international response and cooperation on large movements of refugees. In particular, it provides 4 key objectives. First of all, it requires states to alleviate pressure on countries which host a large number of refugees. Secondly, it asks for the enhancement of refugee self-reliance. Thirdly, it encourages access to third country solutions, and lastly it urges undertaking return in respect of migrants' safety and dignity²⁶⁸. In addition, it supports the idea that refugees should be included in the communities, and refugee camps should only be a temporary measure in emergency cases. They should have access to education and the labour market, so that they may improve their skills and become self-reliant. They should be integrated in development plans, in line with the pledges of the 2030 Agenda for Sustainable Development. In this way, refugees could “thrive, not just survive²⁶⁹” and they will be less dependent on humanitarian aid.

Essentially, the Global Compact on Refugees reaffirms and improves the principles and objectives of the 1951 Geneva Convention, in which the rights of refugees and the obligations of states were defined for the first time. However, unlike the Convention, it is

²⁶⁶ Elena CORRADI, *The Global Compact for Migration and the EU: Global effects of a regional backlash*, 4 December 2018. Available at: <https://www.ispionline.it/en/pubblicazione/global-compact-migration-and-eu-global-effects-regional-backlash-21716> (Accessed: 05/01/2019)

²⁶⁷ UNHCR, *Comprehensive Refugee Response Framework*. Available at: <https://www.unhcr.org/comprehensive-refugee-response-framework-crrf.html> (Accessed: 06/01/2019)

²⁶⁸ UN, *The Global Compact on Refugees*, 26 June 2018, point 7. Available at: <https://www.unhcr.org/events/conferences/5b3295167/official-version-final-draft-global-compact-refugees.html> (Accessed: 06/01/2019)

²⁶⁹ UNHCR, *Comprehensive Refugee Response Framework*, cit.

non-binding. On 17 December 2018 the UN General Assembly almost unanimously adopted the text, with 181 votes in favour, 3 abstentions, and 2 votes against, from Hungary and The United States of America.

All the Member States belonging to the Mediterranean area involved in the migration crisis described in this dissertation, decided to join the Global Compact on Refugees. On the other hand, with regard to the Global Compact for Safe, Orderly and Regular Migration, only Italy abstained among the stakeholders of this region. This can be considered as a step forward in relation to the issue and a sign of general awareness of its relevance.

Their non-binding nature makes these documents no more than symbols, nevertheless they are vitally important inasmuch as they are clear signs of commitment and cooperation towards the current and complex topic of migration at global level.

4. Forecasts on possible future of humanitarian NGOs.

Currently, NGOs are facing a set of critical and widespread crises due to the various criticisms made against them. Their legitimacy has first been questioned by governments, but also by people, donors, sometimes even their own staff. Some of the criticisms concern the lack of transparency on supporters' money, the accusation of having too much power and being unaccountable to anyone, or of being apolitical and too close, in some cases, to the corporate sector²⁷⁰.

Nevertheless, this dissertation has shown the importance of NGOs activities in emergency cases. In the Mediterranean area in particular, the intervention of the humanitarian NGOs has been fundamental in saving migrants at sea.

The sector needs a breakthrough, not only to defend against criticisms, but also because the world is transforming and new challenges are emerging, such as a rapidly changing environment with more climate-change-induced events and new conflicts. Political and

²⁷⁰ Deborah DOANE, *The future of aid: will international NGOs survive?* The Guardian, 23 February 2016. Available at: <https://www.theguardian.com/global-development-professionals-network/2016/feb/23/the-future-of-aid-will-international-ngos-survive> (Accessed: 09/01/2019)

demographic transformations are occurring, such as the increasing importance of emerging countries which could change the current context of the Western hegemon²⁷¹. It needs to be considered that crisis drivers, as well as the types, dimension and dynamics of humanitarian crises might change²⁷². Crisis drivers such as floods or earthquakes will increase exponentially because of the impacts of environmental changes due to climate change. Besides these events, also the development of technology will intensify vulnerability across the globe, reflected in issues such as cybernetic collapse, nanotechnology and biotechnology, innovations which may bring a positive progress to modern society, but at the same time they may create large-scale crises. These crisis drivers are likely to generate large new migration flows, exacerbate social divides and end with an escalation of violence and conflicts²⁷³, which humanitarian organizations will have to deal with.

In addition, NGOs of the future will have to deal with the “globalisation paradox”, according to which, in an era in which the world is ever more globalised, at the same time waves of opposing attitudes are increasing, such as nationalism and the tendency of countries to isolate themselves in order to protect their culture, customs and language²⁷⁴. As a consequence, governments of crisis-affected states are likely to be warier of external humanitarian organizations and will probably prefer trying to solve their problems from within. This implies the reinforcement of the concept of sovereignty which will weaken receptivity about the rights of access and governments will be more restrictive in determining the cases where external aids are required, with the result that non-traditional actors, such as non-governmental organizations, will be less and less tolerated.

These difficulties for NGOs should not be seen as a threat but as an opportunity to create a more inclusive and efficient humanitarian system, different but at the same time still true to its missions and objectives. Some of these are included in the Agenda for Humanity, an Annex to the Report of the UN Secretary General for the World Humanitarian Summit, which was held in Istanbul on 23 and 24 May 2016. On that occasion, 180 UN Member States and over 700 NGOs were present. The five cores of the

²⁷¹ Randolph KENT et al., *The Future of Non-Governmental Organisations in the Humanitarian Sector: Global Transformations and their consequences*, London, Humanitarian Futures Programme, August 2013, p. 5.

²⁷² Ivi, p. 6.

²⁷³ Ivi, pp. 20-21.

²⁷⁴ Ivi, p. 17.

Agenda concern the commitment to prevent and end conflicts; to respect the rules of war protecting civilians and offering humanitarian aids; to leave no one behind, undertaking the support of vulnerable subjects such as migrants and women; to work differently to end need, reinforcing local systems and preventing crises; to invest in humanity, for instance in local skills²⁷⁵.

In order to reach these objectives, facing both the new possible challenges of the future and the distrust towards them, new forms of alliance and transnational cooperation could be significant elements for the future of humanitarian NGOs. According to Daniel Verger, executive director of the French NGOs coordination named *Coordination Sud*, the first essential change for non-governmental cooperation in the future is the internationalization of all NGOs²⁷⁶. The context in which we live is ever more interconnected, communication technologies increasingly facilitate the sharing of information, therefore, according to him, national NGOs do not seem to make any sense. The NGOs should improve their connections and create an effective network, with more equitable resource sharing between Northern and Southern NGOs. According to Marco Rotelli, current President of the Italian humanitarian Organization INTERSOS, the NGOs should be international not only with regard to their headquarters, but also with regard to their mentality and internal governance, opening their doors to experts from the South of the world who currently are increasingly improving their skills²⁷⁷.

NGOs in the future should develop innovations and innovative practices, among which it will be essential to promote dialogue and systematic interactions with the natural and social sciences, thus increasing their partnerships and relations with other actors, and it will be fundamental for them to have intermediaries who can bring a wide range of actors together and focus their capacities in dealing with the issues at stake. NGOs will act as catalysts for the humanitarian sector, not only for the advocacy of emergencies or the promotion of accountability standards as up to now, but also for the identification of the

²⁷⁵ Agenda for Humanity: Annex to the Report of the Secretary-General for the World Humanitarian Summit (A/70/709, 2 February 2016). Available at: <https://www.agendaforhumanity.org/sites/default/files/AgendaforHumanity.pdf> (Accessed: 09/01/2019)

²⁷⁶ *Cooperazione: come saranno le ONG del futuro?* VPS, 7 February 2012. Available at: http://www.volontariperlosviluppo.it/index.php?option=com_content&view=article&id=1874:cooperazione-come-saranno-le-ong-del-futuro&catid=61&Itemid=200038 (Accessed: 09/01/2019)

²⁷⁷ *Ibidem*.

various types of threats and for the creation of coalitions and forums of partners, also using integrated platforms²⁷⁸.

With the aim of increasing their transparency, NGOs should use technology and social networks for being more and more in contact with people, donors, and supporters, informing about their projects, updating about all their activities, promoting viral campaigns to spread messages, so readers may become activists. On the other hand, this new tech expert generation is changing the way in which it shows its compassion and contribution to humanitarian activities, shifting to peer-to-peer financing and more direct forms of financial transfers such as crowdsourcing projects. Thus, the monthly aid payments in support of NGOs are decreasing, since technologies lead people to undertake more autonomous actions²⁷⁹. In addition, also government sources may be on the wane and may be more interested in funding their own local organizations²⁸⁰.

Therefore, NGOs should change, as

“Those who survive the future are going to be the ones who find novel and imaginative ways of combining new kinds of grant income with philanthropic money, social impact investments and new configurations of partnerships with public and private sector²⁸¹.”

Therefore, geopolitical changes, new development actors and technology advances are the main factors which require NGOs to rethink their role and funding.

Humanitarian crises of the future may be different from the current crises and may require mechanisms not based on past experiences. NGOs need to prove their value on a regular basis in a context of increasing uncertainty and complexity. Nevertheless, according to the INTERSOS Secretary General Kostas Moschochoritis, the humanitarian NGOs won't stop intervening in emergencies situations and carrying out their main objective, that is

²⁷⁸ Randolph KENT et al., *The Future of Non-Governmental Organisations in the Humanitarian Sector*, cit., p. 9.

²⁷⁹ Ben RAMALINGAM, *The survival instinct: How international NGOs can adapt for the future*, 3 March 2016. Available at: <https://www.ids.ac.uk/opinions/the-survival-instinct-how-international-ngos-can-adapt-for-the-future/> (Accessed: 09/01/2019)

²⁸⁰ Randolph KENT et al., *The Future of Non-Governmental Organisations in the Humanitarian Sector*, cit., p. 8.

²⁸¹ Ben RAMALINGAM, *The survival instinct: How international NGOs can adapt for the future*, cit.

not only to alleviate suffering, providing direct relief through the provision of food or whatever other basic necessities, but most of all to restore human dignity²⁸². Despite criticisms and policies unfavourable to their activities, what is sure is that members of humanitarian NGOs won't stop putting their life at the service of the lives of others, guided by the firm belief enclosed in the Latin saying "Homo sum. Humani nihil a me alienum puto"²⁸³.

²⁸² Marco CRESCENZI, *Nonprofit, lavorare nell'emergenza umanitaria per restituire il futuro*, Il Fatto Quotidiano, 21 December 2016. Available at: <https://www.ilfattoquotidiano.it/2016/12/21/nonprofit-lavorare-nellemergenza-umanitaria-per-restituire-il-futuro/3269708/> (Accessed: 11/01/2019)

²⁸³ "I am a human being. Nothing that is human is foreign to me." This sentence is contained in the comedy *Heautontimorùmenos*, wrote by the Latin playwright Terence in 164 B.C. Among the possible interpretations, it is commonly believed that the author wanted to say that every human being, by nature, is led to experience the feeling of humanity and thus help other human beings.

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